Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), this Court held that "all of the predicate acts supporting the jury's finding of a RICO violation must be reversed," that therefore "the judgment that petitioners violated RICO must also be reversed," and that "[w]ithout an underlying RICO violation, the injunction issued by the district court must necessarily be vacated." *Id.* at 411. On remand, however, the Seventh Circuit held that all of the predicate acts were *not* reversed, and that an injunction under RICO might yet be sustained against petitioners on the basis of the supposedly unreversed predicate acts. The questions presented are:

1. Does the Seventh Circuit's defiance of this Court's mandate merit summary reversal?
2. Did the Seventh Circuit err by ruling, in conflict with the Ninth Circuit, and in conflict with the official position of the Department of Justice, that private civil litigants may obtain injunctive relief under the federal Racketeer Influenced and Corrupt Organizations (RICO) statute?
3. Did the Seventh Circuit err by ruling, in conflict with the Sixth and Ninth Circuits, and in conflict with the official position of the Department of Justice, that the federal Hobbs Act, 18 U.S.C. § 1951, may plausibly be construed to prohibit, without any connection to robbery or extortion, any act or threat of "physical violence to any person or property" that "in any way or degree . . . affects commerce"?

PARTIES

In addition to petitioner Operation Rescue,[1] the following parties were defendants-appellants in the Seventh Circuit and are nominal respondents here (*see* S. Ct. R. 12.6):

Joseph M. Scheidler
Pro-Life Action League, Inc.
Andrew D. Scholberg
Timothy Murphy

Respondent National Organization for Women, Inc. (NOW), plaintiff-appellee below, sued on behalf of itself and its members and was certified as representative of the plaintiff "class of women who are not NOW members and whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities." Pet. App. 91a. In addition, there are two other named respondents, the Delaware Women's Health Organization, Inc. (DWHO) and the Summit Women's Health Organization, Inc. (Summit). Both DWHO and Summit sued on behalf of themselves and were certified as representatives of the plaintiff "class of all women's health centers in the United States at which abortions are performed." *Id.* These respondents, like NOW, were plaintiffs-appellees in the Seventh Circuit.

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[1]Operation Rescue is not a corporation. *See* S. Ct. Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES vii

ABBREVIATIONS KEY xv

DECISIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

1. Jurisdiction in District Court 2

2. Facts Material to Consideration of the Questions .. 2

a. Noncompliance with the mandate 2

b. Availability of injunctive relieve to private parties under RICO 3

c. Nonexistence of stand-alone "violence" prong in Hobbs Act 3

3. Course of Proceedings 5

REASONS FOR GRANTING THE WRIT 7

I. THE SEVENTH CIRCUIT DISREGARDED THIS COURT'S MANDATE. 8

1. Direct conflict with terms of Supreme Court's holding. 9

2. Direct conflict with stated premises of Supreme Court's opinion. 10

3. Meritlessness and waiver of the rationale for circumventing the Supreme Court's decision. 11

4. Absence of any final judgment to support a permanent injunction. 11

II. THE SEVENTH CIRCUIT HAS IN EFFECT AMENDED RICO TO CREATE A PRIVATE INJUNCTIVE REMEDY, THEREBY CAUSING A CIRCUIT SPLIT. 13

A. Split in the Circuits 13

B. Conflicts with this Court's Precedent. 15

C. Disregard of Text and History of RICO 16

1. RICO's Statutory Text 16

2. RICO's Legislative History 18

a. Selection of treble damages remedy 19

b. Rejection of private injunctive remedy ... 19

D. Conflict with Department of Justice and Importance of the Question 22

III. THE SEVENTH CIRCUIT'S HOLDING THAT THE HOBBS ACT MAY PLAUSIBLY BE READ TO PROHIBIT VIOLENCE UNCONNECTED TO EXTORTION OR ROBBERY DIRECTLY CONFLICTS WITH THE HOLDINGS OF TWO OTHER CIRCUITS AS WELL AS THE POSITION OF THE DEPARTMENT OF JUSTICE, RAISES AN IMPORTANT ISSUE, AND IS INDEFENSIBLE ON THE MERITS. 23

CONCLUSION 27

APPENDICES

A. Decision of the U.S. Court of Appeals for the Seventh Circuit (Jan. 28, 2005) (denying rehearing) 1a

B. Order of the U.S. Court of Appeals for the Seventh Circuit (Feb. 26, 2004) (remanding to district court) 26a

C. Decision of the U.S. Supreme Court (Feb. 26, 2003) 32a

D. Memorandum and Opinion of District Court (N.D. Ill. July 16, 1999) (granting permanent injunction) 56a

E. Judgment of the District Court (N.D. Ill. Aug. 25, 1999) 97a

F. Decision of the U.S. Court of Appeals for the Seventh Circuit (Oct. 2, 2001) 103a

G. Order of the U.S. Supreme Court (Apr. 22, 2002) (granting certiorari) 138a

H. Hobbs Act, 18 U.S.C. § 1951 ..... 139a

I. RICO [excerpts], 18 U.S.C. §§ 1961, 1964 ..... 140a

J. Jury's Special Interrogatories and Verdict Form ... 142a

TABLE OF AUTHORITIES

Page

CASES

Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987) 16, 18, 19, 21

Airline Reporting Corp. v. Barry, 825 F.2d 1220 (8th Cir. 1987) 15

Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987) 12

Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 103 F. Supp. 2d 134 (N.D.N.Y. 2000), *aff'd*, 268 F.3d 103 (2d Cir. 2001) 14

Beck v. Prupis, 529 U.S. 494 (2000) 18

Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), *aff'd on reh'g*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983) 15

Bernard v. Taub, 1990 WL 34680 (E.D.N.Y. Mar. 21, 1990) 14

Chambers Development Co. v. Browning-Ferris Industries, 590 F. Supp. 1528 (W.D. Pa. 1984) 14

Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1123 (D.N.J. 1989) 14

Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983) 15

DeMent v. Abbott Capitol Corp., 589 F. Supp. 1378 (N.D. Ill. 1984) 14

F.T. Int'l, Ltd. v. Mason, 2000 U.S. Dist. LEXIS 14979 (E.D. Pa. Oct. 11, 2000) 14

First Nat'l Bank and Trust Co. v. Hollingsworth, 701 F. Supp. 701 (W.D. Ark. 1988) 15

Galerie Furstenberg v. Coffaro, 697 F. Supp. 1282 (S.D.N.Y. 1988) 14

Ganey v. Raffone, 91 F.3d 143 (6th Cir. 1996) 15

Holmes v. SIPC, 503 U.S. 258 (1992) 16

In re Fredeman Litigation, 843 F.2d 821 (5th Cir. 1988) 14, 19

In re Managed Case Litigation, 298 F. Supp. 2d 1259 (S.D. Fla. 2003) 15

Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989) ... 18

Johnson v. Collins Entertainment Co., 199 F.3d 710 (4th Cir. 1999) 15

Kaushal v. State Bank of India, 556 F. Supp. 576 (N.D. Ill. 1983) 14

Klehr v. A. O. Smith Harvestore Products, Inc., 521 U.S. 179 (1997) 18

Lincoln House, Inc. v. Dupre, 903 F.2d 845 (1st Cir. 1990) 15

Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) 18

Miller v. Affiliated Financial Corp., 600 F. Supp. 987 (N.D. Ill. 1984) 14

Minnesota v. Northern Securities Co., 194 U.S. 48 (1904) 15

Motorola Credit Corp. v. Uzan, 202 F. Supp. 2d 239 (S.D.N.Y. 2002), *remanded*, 322 F.3d 130 (2d Cir. 2003) 15

National Organization for Women v. Scheidler, 765 F. Supp. 973 (N.D. Ill. 1991) 1

National Organization for Women v. Scheidler, 968 F.2d 612 (7th Cir. 1992) 1

National Organization for Women v. Scheidler, 508 U.S. 971 (1993) 1

National Organization for Women v. Scheidler, 510 U.S. 249 (1994) 1

National Organization for Women v. Scheidler, 897 F. Supp. 1047 (N.D. Ill. 1995) 1, 4

National Organization for Women v. Scheidler, 172 F.R.D. 351 (N.D. Ill. 1997) 1

National Organization for Women v. Scheidler, 267 F.3d 687 (7th Cir. 2001) 1

National Organization for Women v. Scheidler, 91 Fed. Appx. 510, 2004 U.S. App. LEXIS 4020 (7th Cir. Feb. 26, 2004) 1, 6, 9, 12

National Organization for Women v. Scheidler, 396 F.3d 807 (7th Cir. 2005) ..... 1, *passim*

National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974) 18

Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000) 14

P.R.F., Inc. v. Philips Credit Corp., 1992 WL 385170 (D.P.R. Dec. 21, 1992) 14

Paine Lumber Co. v. Neal, 244 U.S. 459 (1917) 15

R.E. Davis Chemical Corp. v. Nalco Chemical Co., 757 F. Supp. 1499 (N.D. Ill. 1990) 14

Raymark Industries, Inc. v. Stemple, 714 F. Supp. 460 (D. Kan. 1988) 15

Religious Technology Center v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) 13, 14, 20

Reves v. Ernst & Young, 507 U.S. 170 (1993) 17

Rotella v. Wood, 528 U.S. 549 (2000) 18

Russello v. United States, 464 U.S. 16 (1983) 22

Scheidler v. National Organization for Women, Inc., 535 U.S. 1016 (2002) 1

Scheidler v. National Organization for Women, Inc., 537 U.S. 393 (2003) ..... i, *passim*

Sedima S.P.R.L. v. Imrex, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985) 15, 21

Sedima S.P.R.L. v. Imrex, 473 U.S. 479 (1985) ... 16, 18-21

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1990) 17

Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Ass'n, 802 F. Supp. 662 (D.R.I. 1992), *aff'd*, 989 F.2d 1266 (1st Cir.), *cert. denied*, 510 U.S. 1024 (1993) 14

Town of West Hartford v. Operation Rescue,
726 F. Supp. 371 (D. Conn. 1989), *vac'd*,
991 F.2d 1039 (2d Cir.), *cert. denied*,
510 U.S. 865 (1993) 14

Trane Co. v. O'Connor Securities, 718 F.2d 26
(2d Cir. 1983) 15

Transamerica Mortgage Advisors, Inc. v. Lewis,
444 U.S. 11 (1979) 18

United States v. Franks, 511 F.2d 25 (6th Cir. 1975) 8, 26

United States v. Yankowski, 184 F.3d 1071
(9th Cir. 1999) 8, 26

University of Texas v. Camenisch, 451 U.S. 390 (1981) ... 12

*Vietnam Veterans of America, Inc. v. Guerdon
Industries, Inc.*, 644 F. Supp. 951 (D. Del. 1986) 14

STATUTES, RULES, & LEGISLATIVE MATERIALS

Hobbs Act, 18 U.S.C. § 1951 ..... i, *passim*

RICO, 18 U.S.C. § 1964 ..... 1, *passim*

28 U.S.C. § 1254 1

28 U.S.C. § 1331 2

Pub. L. No. 486, 60 Stat. 420 (1946) 25

115 Cong. Rec. 6,992-96 (1969) 20

116 Cong. Rec. 27,738-39 (1970) 20

116 Cong. Rec. 35,227-28 (1970) 20, 21

116 Cong. Rec. 35,346-47 (1970) 21

117 Cong. Rec. 46,386, 46,393 (1971) 21

118 Cong. Rec. 29,368, 29,370 (1972) 22

119 Cong. Rec. 10,317-19 (1973) 22

H.R. 19215, 91st Cong. 2d Sess. (1970) 20

H.R. Rep. No. 1549, 91st Cong., 2d Sess. 58 (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4007 20

S. Ct. R. 12.6 ii

S. Ct. R. 29.6 ii

Victims of Crime: Hearings on S. 16, S. 33, S. 750, S. 1946, S. 2087, S. 2426, S. 2748, S. 2856, S. 2994, and S. 2995 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. (1970-1971) 21

OTHER AUTHORITIES

U.S. Dep't of Justice Criminal Resource Manual 2402 (Hobbs Act -- Generally) (available at www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02402.htm) 8, 26

ABBREVIATIONS KEY

App.	Appendix
JVF	Jury Verdict Form
NOW	Respondent National Organization for Women, Inc.
Opp.	Opposition
OR	Petitioner Operation Rescue
Pet.	Petition
Tr.	Transcript of trial

DECISIONS BELOW

Except where noted, all pertinent decisions in this case to date are entitled *National Organization for Women, Inc. v. Scheidler*. The district court's original dismissal of the case appears at 765 F. Supp. 973 (N.D. Ill. 1991), and the Seventh Circuit's affirmance at 968 F.2d 612 (7th Cir. 1992). This Court's partial grant of certiorari appears at 508 U.S. 971 (1993), and subsequent reversal at 510 U.S. 249 (1994). On remand, the district court's partial dismissal of the case appears at 897 F. Supp. 1047 (N.D. Ill. 1995), and the district court's certification of plaintiff classes appears at 172 F.R.D. 351 (N.D. Ill. 1997). The Seventh Circuit's decision affirming judgment for respondents appears at 267 F.3d 687 (7th Cir. 2001). This Court's partial grant of certiorari appears *sub nom. Scheidler v. National Organization for Women, Inc.*, 535 U.S. 1016 (2002), and this Court's subsequent reversal appears *sub nom. Scheidler v. NOW*, 537 U.S. 393 (2003). The Seventh Circuit's initial order on remand is unpublished but is available at 91 Fed. Appx. 510, 2004 U.S. App. LEXIS 4020 (7th Cir. Feb. 26, 2004). The Seventh Circuit's opinion upon the denial of rehearing appears at 396 F.3d 807 (7th Cir. 2005).

JURISDICTION

The U.S. Court of Appeals rendered its panel decision on remand on Feb. 26, 2004, and denied timely petitions for rehearing and rehearing en banc on Jan. 28, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS

The Appendix contains the text of the Hobbs Act, 18 U.S.C. § 1951 (Pet. App. 139a), and excerpts of the federal RICO statute, 18 U.S.C. § 1964 (Pet. App. 140a-41a).

STATEMENT OF THE CASE

1. Jurisdiction in District Court

This is a civil RICO case in which the district court's jurisdiction was invoked, *inter alia*, under 28 U.S.C. § 1331 and 18 U.S.C. § 1964.

Respondents -- plaintiffs below -- are the National Organization for Women, Inc. (NOW), the Delaware Women's Health Organization (DWHO), the Summit Women's Health Organization (Summit), and the classes they were certified to represent. (The plaintiffs changed over the course of the litigation. For convenience, this brief refers collectively to "NOW.") The defendants, including petitioner Operation Rescue (OR), are pro-life activist individuals and organizations.

2. Facts Material to Consideration of the Questions

a. Noncompliance with the mandate

The question whether the Seventh Circuit failed to comply with this Court's mandate is a pure question of law. Material to that question are, *inter alia*: on the one hand, the undisputed contents of this Court's opinion, including specifically the holding that "all of the predicate acts supporting the jury's finding of a RICO violation must be reversed," that therefore "the judgment that petitioners violated RICO must also be reversed," and that "[w]ithout an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated," 537 U.S. at 411 (Pet. App. 48a); and, on the other hand, the Seventh Circuit's ruling on remand, specifically its holding that there are "four more predicate acts" that this Court "made no ruling on," Pet. App. 6a, and that an injunction under RICO remains possible "based on the record that has already been built," Pet. App. 8a.

b. Availability of injunctive relief to private plaintiffs under RICO

The question whether RICO authorizes private parties to sue for injunctive relief is a pure question of law. Material to that question are the undisputed facts that respondents (plaintiffs) are private parties and that all of respondents' claims other than RICO were eliminated prior to trial and final judgment. The district court rejected petitioner's contention that RICO does not authorize private parties to sue for injunctive relief. Pet. App. 83a-84a, and granted a permanent injunction. Pet. App. 98a-102a. The Seventh Circuit affirmed, holding -- despite a contrary holding in the Ninth Circuit -- that RICO authorizes private injunctive relief. Pet. App. 108a-18a. This Court granted certiorari on precisely that issue, Pet. App. 32a, but declined to decide the question because the complete failure of respondents' RICO claims required that the injunction be vacated in any event, Pet. App. 48a. On remand, the Seventh Circuit ruled that an injunction might yet issue under RICO because this Court had supposedly failed to address four RICO predicate acts. Pet. App. 4a-17a.

c. Nonexistence of stand-alone "violence" prong in Hobbs Act

The question whether the federal Hobbs Act, 18 U.S.C. § 1951, prohibits any act or threat of "physical violence to any person or property" which "in any way or degree . . . affects commerce," without any connection to robbery or extortion, is a pure question of law. Material to that question are the text and meaning of the Hobbs Act and the Seventh Circuit's ruling that such an interpretation is both plausible and sufficient to justify further proceedings in the district court.

NOW's theory of the case was that any physical obstruction of abortion -- e.g., by a sit-in -- was extortion and thus a

predicate act of racketeering under RICO. *See, e.g.*, Tr. 4327; *id.* at 5003-09.[2] The district court adopted this view of extortion. *E.g.*, *NOW v. Scheidler*, 897 F. Supp. 1047, 1072-74 (N.D. Ill. 1995).

In closing arguments, NOW argued for a jury finding of "no less than 30 blockades [i.e., sit-ins]," Tr. 5005, arguing that each sit-in was an act of predicate extortion, *id.* The jury apparently found 25 sit-ins total.[3] Pet. App. 143a-44a. NOW also argued for at least five *threats* of physical violence, Tr. 5013-16, and seven *acts* of physical violence, Tr. 5022-23, but the jury found only four acts *or* threats total. Pet. App. 143a.

It is undisputed that this Court overturned all of the extortion predicates under federal and state law. It is also undisputed that the extortion predicates comprised *at least* 117 of the 121[4]

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[2]E.g., Tr. 5003 (closing argument of plaintiffs) ("if the defendants prevented women from getting any of those services [provided by abortion businesses], then those interferences are RICO violations"); *id.* at 5005 ("Each and every one of those blockades that shut the clinics down for any period of time was an illegal act of extortion under RICO").

[3]The jury was instructed to treat each intentional sit-it at an abortion business as both *actual* and *attempted* extortion. *See* Tr. 4945-48. Accordingly, the jury found the same number of "acts or threats" as it did "attempts" in each category (25 each for "extortion," 23 each for Travel Act violations). Pet. App. 143a-44a. Furthermore, the instructions for state and federal extortion were virtually identical, Tr. 4944-47, with the difference that the federal version had an interstate commerce element. Tr. 4945. Accordingly, the jury found a virtually identical number of violations in the state and federal categories, with only slightly fewer in the federal categories (presumably for lack of the interstate element). Pet. App. 143a-44a. Thus, a single sit-it would count simultaneously in Verdict Form boxes 4(a), (b), (d), (f), and (g), except that 4(a), (f), and (g) also had interstate travel or commerce elements. *Id.*

[4]The "121" figure exaggerates the number of predicates, as it reflects quintuple counting. *Supra* note 3. NOW has conceded this. Brief of

(continued...)

predicate acts the jury found (i.e., at least jury verdict responses 4(a), (b), (d), (f), and (g)). The disputed four predicates (jury verdict response 4(e)) referred to "[a]cts of threats of physical violence to any person or property," Pet. App. 143a, and is undisputed that this refers to the Hobbs Act's making it a crime to commit or threaten "physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section," Pet. App. 139a. The legal dispute is whether or not, in the phrase "in furtherance of a plan or purpose to do anything in violation of this section," the clause "violation of this section" refers to interference with or affecting commerce *by extortion or robbery* (or attempts or conspiracies to extort or rob), or instead merely to interfering with or affecting commerce.

3. Course of Proceedings

This nearly twenty-year old case has a lengthy history, most of which is immaterial to the present petition. For present purposes, it suffices to note the following.

NOW went to trial solely on its federal RICO claim. The jury rendered a verdict in favor of NOW and awarded damages. Pet. App. 142a. The district court then issued a nationwide injunction and entered judgment for NOW. Pet. App. 56a, 97a. The Seventh Circuit affirmed in all respects. Pet. App. 103a.

The defendants filed two separate petitions for certiorari. This Court granted review limited to two questions: (1) whether RICO, 18 U.S.C. § 1964(c), authorizes private injunctive relief; and, (2) whether the Hobbs Act criminalizes sit-its and obstructive demonstrations by political protesters. Pet. App. 32a, 138a.

After full briefing and oral argument, this Court reversed. The Court held that there was no Hobbs Act violation here

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[4](...continued)
Respondents (Nos. 01-1118 & 01-1119) at 3 & n.4, 35 & n.45.

because the conduct at issue did not qualify as "extortion." Pet. App. 35a-46a. For the same reason, the Court held that the other RICO predicates, namely extortion under state law and under the federal Travel Act, were likewise meritless. Pet. App. 46a-48a. Accordingly, having eliminated all of the RICO predicates, and thus the RICO judgment, this Court held that the RICO injunction "must necessarily be vacated," Pet. App. 48a. The Court said it "therefore need not address" the now-moot question whether RICO authorizes private injunctive relief. *Id.*

NOW did not seek rehearing in this Court.

On remand, the Seventh Circuit did *not* simply remand with instructions to enter judgment for defendants. Instead, the court below opined that this Court had overlooked four predicate acts, and that those predicate acts might yet support the nationwide injunction the district court had issued. Pet. App. 30a-31a. The court below did not explain how it could reconcile that ruling with this Court's holding that "all of the predicate acts . . . must be reversed," that "the judgment that petitioners violated RICO must also be reversed," and that "the injunction must necessarily be vacated."

Defendants petitioned for rehearing and rehearing en banc. The Seventh Circuit denied both, the latter over three dissenting votes. Pet. App. 1a n.*. In an opinion accompanying the denial of rehearing, the panel adhered to its view that this Court had failed to address four of the RICO predicate acts and that an injunction might yet be sustainable under RICO based on those four predicates. Pet. App. 6a. The court below backed away somewhat from its earlier ruling, however. It now declined to endorse a nationwide injunction, suggesting such would be an "abuse of discretion," Pet. App. 16a, and that only some narrower injunction would be permissible, Pet. App. 17a. (The court below also declared that it was "too late" for NOW to seek any damages, and that the record could not be reopened for

further development. Pet. App. 7a-8a, 16a-17a.)

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with this Court's decision in this case, *see Scheidler v. NOW*, 537 U.S. 393 (2002). This merits summary reversal.

In addition, the decision below raises at least two questions of exceptional importance, on which the decision below squarely conflicts both with the decisions of other circuits and with the position of the United States Department of Justice.

First, does the federal Racketeer Influenced and Corrupt Organizations Act (RICO) statute, 18 U.S.C. § 1964, authorize private injunctive relief? The court below initially held that the answer was "Yes." *See NOW v. Scheidler*, 267 F.3d 687, 695-700 (7th Cir. 2001). This Court granted review of this question but declined to answer it because the Court held that NOW's failure on the underlying *merits* required reversal of the judgment and vacation of the injunction. Pet. App. 48a. By defying this Court's directive and ruling that the injunction may yet be sustainable, the court below has resurrected this issue and reopened a conflict in the circuits. Every other court of appeals to take a position on the same issue has either rejected private equitable relief under RICO or expressed grave doubts that such relief is available. *See infra* notes 7-8. The United States, in its amicus brief in this Court in the present case, likewise took the position that RICO does not authorize private injunctive relief. *See* Br. for the United States as Amicus Curiae, § I (available at http://www.usdoj.gov/osg/briefs/2002/3mer/1ami/2001-1118.mer.ami.pdf). (Of course, if this Court were to grant certiorari and summarily reverse for failure to obey this Court's direction to reverse the judgment and vacate the injunction, there would once more be no need to reach this issue.)

Second, does the federal Hobbs Act, 18 U.S.C. § 1951, create

a general federal crime of "violence" to person or property that "affects commerce"? The possibility that the Hobbs Act creates such a crime is the sole basis the court below gives for reopening this case. Pet. App. 6a-8a, 17a. Yet to embrace this novel and tremendously expansive reading of the Hobbs Act would be to mint an extraordinary new federal crime. Two other federal circuits have already rejected this misreading of the Hobbs Act. *See United States v. Yankowski*, 184 F.3d 1071 (9th Cir. 1999) (holding that Hobbs Act does not prohibit "violence" apart from robbery or extortion); *United States v. Franks*, 511 F.2d 25 (6th Cir. 1975) (same). The Department of Justice also takes the position that there can be no Hobbs Act "violence" crime absent a link to extortion or robbery. *See* U.S. Dep't of Justice Criminal Resource Manual 2402 (Hobbs Act -- Generally) ("The statutory prohibition of 'physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section' is confined to violence for the purpose of committing robbery or extortion") (citing *Franks*) (available at www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02402.htm). (Again, summarily reversing for failure to follow this Court's directive to reverse the judgment and vacate the injunction would moot this issue.)

I. THE SEVENTH CIRCUIT DISREGARDED THIS COURT'S MANDATE.

This Court held in this case as follows:

> Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated.

Scheidler v. NOW, 537 U.S. at 411. The court below simply ignored this unambiguous directive.

The lower court completely disregarded this Court's holding that the judgment "must be reversed" and that the injunction "must necessarily be vacated." Instead, the court below asked whether the post-judgment relief of a permanent injunction under RICO might be sustainable on the basis of jury findings of four acts or threats of "violence" to persons or property. Moreover, the Seventh Circuit's rationale for raising questions about the relief available is wholly meritless because that rationale lacks any support whatsoever in the text of the pertinent statute (the Hobbs Act), ignores NOW's abandonment of this argument, and runs directly contrary both to the decisions of the two other federal appeals courts to address the issue and to the position of the Department of Justice.

This Court expressly directed that "all of the predicate acts supporting the jury's findings of a RICO violation must be reversed," that "the judgment that petitioners [defendants] violated RICO must also be reversed," and that therefore "the injunction issued by the district court must necessarily be vacated," *Scheidler v. NOW*, 537 U.S. at 411.

Despite this clear decree, the Seventh Circuit on remand *ignored* the fact that the judgment, which provided the sole basis for the injunction, "must . . . be reversed," *id.* Instead, the court below directed the district court to decide, in the first instance, whether there are remaining predicate acts that "might independently support the injunction," Pet. App. 29a, or some narrower injunction, Pet. App. 16a-17a. This is direct defiance of this Court's ruling.

1. Direct conflict with terms of Supreme Court's holding.

The Seventh Circuit's suggestion that the permanent

injunction could reissue on the basis of some of the predicates the jury found after trial back in 1998 conflicts both with this Court's express holding that "*all* of the predicate acts" supporting a RICO violation, *and* the "judgment," "must be reversed," and with this Court's express direction that the injunction "must necessarily be vacated." Pet. App. 48a (emphasis added). *See also* Pet. App. 33a ("We . . . hold that our determination with respect to extortion under the Hobbs Act renders insufficient the other bases or predicate acts of racketeering . . .").

2. Direct conflict with stated premises of Supreme Court's opinion.

The Seventh Circuit's ruling that the possibility of an injunction under RICO remains a live issue in this case conflicts with this Court's holding that it need not reach the propriety of private civil injunctions under RICO *precisely because no such injunction was sustainable here.* Pet. App. 33a, 48a. This Court had originally granted certiorari to decide two questions. *See* Pet. App. 32a. One question was whether private injunctive relief is available under RICO. *Id.* This Court did not answer that question only because its holding on the other question -- the merits of NOW's federal extortion predicates -- precluded *any* basis for such an injunction in the first place, Pet. App. 33a, 48a. Thus, the injunction issue became moot because, and only because, regardless of whether RICO authorized such relief, there was no RICO judgment left that could serve as a basis for an injunction *in this case. Id.* The Seventh Circuit's ruling that an injunction may nevertheless issue based on the prior jury verdict is irreconcilable with this Court's holding that the injunction issue no longer remains in the case.

3. Meritlessness and waiver of the rationale for circumventing the Supreme Court's decision.

The lower court's rationale for ignoring this Court's express directions rests entirely upon a wholly unpersuasive misreading of the Hobbs Act. *See infra* § III. Moreover, NOW abandoned this very argument before the Supreme Court.

There was no reason whatsoever for the court below even to begin to indulge NOW's misreading of the Hobbs Act: NOW itself abandoned the claim -- and thus waived it -- at the Supreme Court. At the stage of the petitions for certiorari, NOW floated before this Court its argument that there were Hobbs Act "violence" predicates in this case that were independent of extortion. Brief in Opp. at 5 & n.4, 15. But after defendants met that contention, *see* OR's Reply to Brief in Opp. at 7 & n.13, and after this Court granted review, NOW abandoned this argument in the briefing on the merits. *See* Brief of Respondents (Nos. 01-1118 & 01-1119) at 33-36 (raising only state extortion, not Hobbs Act "violence," as independent basis for the judgment).[5] Tellingly, NOW did *not* argue, either in its merits brief or by petitioning for rehearing, that the injunction or underlying judgment was sustainable under a Hobbs Act "violence" theory.

In short, the theory that there is a "nonextortionate violence" prong to the Hobbs Act is not only textually incoherent and contradicted by the extant case law, *infra* § III, it is irrelevant because NOW waived it.

4. Absence of any final judgment to support a permanent injunction.

But even aside from these fatal defects, the Seventh Circuit's

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[5]Indeed, NOW argued that *all* of the acts violating the Hobbs Act also supported the state law predicates, *id.* at 3 n.4, 35. The state law predicates consisted exclusively of extortion, not "violence" alone.

remand order suffers an additional fatal flow: it ignores the fact that the judgment -- the basis for the permanent injunction -- "must be reversed." Pet. App. 48a. As this Court unequivocally stated, "We further hold that our determination with respect to extortion under the Hobbs Act renders insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that [defendants NOW] violated RICO." Pet. App. 33a.

Even if this Court had not clearly directed reversal of the RICO judgment, and even if NOW's absurd reading of the Hobbs Act were correct, and even if NOW had not waived the argument in this Court, that argument still could not "independently support the injunction," Pet. App. 29a, because a permanent injunction can only issue when a party finally prevails on the merits. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987) (citing *University of Texas v. Camenisch*, 451 U.S. 390, 392 (1981)). Here, NOW has lost on all claims. But even under NOW's bizarre theory seeking resuscitation of part of their lawsuit, NOW would at most be entitled to pursue a *retrial* limited to their theory of predicate Hobbs Act "violence." A retrial order, however, is not a final victory on the merits, and thus it cannot support a permanent injunction. Furthermore, even the retrial option is no longer open to NOW: the Seventh Circuit in this case directed that there be *no* retrial. Pet. App. 7a-8a, 16a-17a.

The jury's verdict of liability under RICO rested on a series of separate findings. *See* Jury Verdict Form (JVF) (Pet. App. 142a). Even if NOW were correct that this Court did not overturn 100% of the predicates, NOW concedes that at least more than 96% of the predicates (117 of 121, according to NOW) were reversed. Thus, it is impossible to conclude that the four supposedly remaining predicates would necessarily have sufficed to sustain the other essential jury findings, for example,

of a RICO "pattern" (JVF #7), an effect on interstate commerce (JVF #8), or proximate causation of injury to the plaintiffs (JVF #9). *See also Scheidler v. NOW*, 537 U.S. at 401 n.5 (Pet. App. 37a n.5) (even a single faulty theory of RICO liability in the jury instructions would preclude affirmance of the judgment).

In short, even under NOW's theory of the case, the judgment must be overturned, leaving no basis for the permanent injunction. The Seventh Circuit's failure even to mention this, especially given this Court's clear directive that the verdict and judgment "must be reversed," is truly remarkable.

II. THE SEVENTH CIRCUIT HAS IN EFFECT AMENDED RICO TO CREATE A PRIVATE INJUNCTIVE REMEDY, THEREBY CAUSING A CIRCUIT SPLIT.

The Seventh Circuit in this case has created a split in the circuits by holding that RICO authorizes private injunctive relief. This Court previously granted certiorari on this question, but did not need to resolve the issue because this Court held that NOW had failed to establish any RICO violation that could support a private injunction in the first place. The Seventh Circuit on remand held that this Court's conclusion -- that all of the RICO predicates were reversed -- was erroneous and that an injunction could therefore still issue under RICO. Hence, the Seventh Circuit has resuscitated the RICO injunction issue in this case.

A. Split in the Circuits

In *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), the Ninth Circuit exhaustively analyzed the text and history of the remedies section of RICO, the pertinent precedents, and the competing legal arguments, *see Wollershiem*, 796 F.2d at 1080-88. The *Wollersheim* court concluded that "the legislative

history and statutory language suggests overwhelmingly that no private equitable action should be implied under civil RICO." *Id.* at 1088 (footnote omitted). *Wollersheim* remains good law in the Ninth Circuit. *E.g.*, *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 967-68 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000).

Many other federal courts have also addressed this question. Not a single appellate court since *Wollersheim* -- other than in this case -- has held, contrary to *Wollersheim*, that private parties can obtain injunctive relief under RICO. Even prior to *Wollersheim*, only one district court so held.[6]

Every other circuit to address the issue (except in this case) has either rejected private equitable relief under RICO,[7]

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[6]*Chambers Development Co. v. Browning-Ferris Industries*, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984).

[7]*E.g.*, *Wollersheim; In re Fredeman Litigation*, 843 F.2d 821, 828-30 (5th Cir. 1988). *Accord Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Ass'n*, 802 F. Supp. 662, 671 (D.R.I. 1992), *aff'd on other grounds*, 989 F.2d 1266, 1273 n.8 (1st Cir.), *cert. denied*, 510 U.S. 1024 (1993); *P.R.F., Inc. v. Philips Credit Corp.*, 1992 WL 385170 at *2-*3 (D.P.R. Dec. 21, 1992); *Galerie Furstenberg v. Coffaro*, 697 F. Supp. 1282, 1294 (S.D.N.Y. 1988); *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371, 376-78 (D. Conn. 1989), *vac'd on other grounds*, 991 F.2d 1039 (2d Cir.), *cert. denied*, 510 U.S. 865 (1993); *Bernard v. Taub*, 1990 WL 34680 at *3-*4 (E.D.N.Y. Mar. 21, 1990); *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 103 F. Supp. 2d 134, 155 (N.D.N.Y. 2000), *aff'd on other grounds*, 268 F.3d 103 (2d Cir. 2001); *Vietnam Veterans of America, Inc. v. Guerdon Industries, Inc.*, 644 F. Supp. 951, 960-61 (D. Del. 1986); *Curley v. Cumberland Farms Dairy, Inc.*, 728 F. Supp. 1123, 1137-38 (D.N.J. 1989); *F.T. Int'l, Ltd. v. Mason*, 2000 U.S. Dist. LEXIS 14979 at *3 n.2 (E.D. Pa. Oct. 11, 2000); *Kaushal v. State Bank of India*, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983); *DeMent v. Abbott Capitol Corp.*, 589 F. Supp. 1378, 1381-83 (N.D. Ill. 1984); *Miller v. Affiliated Financial Corp.*, 600 F. Supp. 987, 994 (N.D. Ill. 1984); *R.E.*

(continued...)

expressed serious doubts about such relief,[8] or declined to decide the question.[9] The Seventh Circuit stands quite alone.[10]

B. Conflicts with this Court's Precedent

This Court has already construed the statutory language in question, in another statute, *not* to authorize private injunctive relief. *See Minnesota v. Northern Securities Co.*, 194 U.S. 48, 70-71 (1904) (section 7 of antitrust statute does not authorize private suits for equitable relief). *Accord Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917). The parallels to RICO are striking. *Compare* 194 U.S. at 68 (section 7 provided: "Any person who shall be injured in his business or property . . . by

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[7](...continued)
Davis Chemical Corp. v. Nalco Chemical Co., 757 F. Supp. 1499, 1526 n.24 (N.D. Ill. 1990); *First Nat'l Bank and Trust Co. v. Hollingsworth*, 701 F. Supp. 701 (W.D. Ark. 1988).

[8]*E.g.*, *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990); *Trane Co. v. O'Connor Securities*, 718 F.2d 26, 28 (2d Cir. 1983); *Sedima S.P.R.L. v. Imrex*, 741 F.2d 482, 489 n.20 (2d Cir. 1984), *rev'd on other grounds*, 473 U.S. 479 (1985); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983); *Johnson v. Collins Entertainment Co.*, 199 F.3d 710 (4th Cir. 1999); *Ganey v. Raffone*, 91 F.3d 143 (6th Cir. 1996) (1996 WL 382278 at **4 n.6). *Accord Raymark Industries, Inc. v. Stemple*, 714 F. Supp. 460, 475-76 (D. Kan. 1988).

[9]*E.g.*, *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982), *aff'd on reh'g*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983); *Airline Reporting Corp. v. Barry*, 825 F.2d 1220, 1223 (8th Cir. 1987).

[10]The Seventh Circuit's decision, however, has begun generating district court decisions that conflict with the otherwise universal consensus against private injunctive relief under RICO. *See, e.g.*, *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239, 243-44 (S.D.N.Y. 2002) (RICO authorizes private injunctive relief), *remanded on other grounds*, 322 F.3d 130 (2d Cir. 2003); *In re Managed Case Litigation*, 298 F. Supp. 2d 1259, 1281-83 (S.D. Fla. 2003) (same).

reason of anything forbidden or declared to be unlawful by this act may sue therefor . . . and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee") *with* Pet. App. 140a-41a (RICO § 1964(c)).

With RICO, Congress employed the "use of an antitrust model for the development of remedies" against crime. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151 (1987). The "clearest current in the legislative history of RICO is the reliance on the [antitrust] model." *Id.* (internal quotation marks and citation omitted). *Accord Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985). It follows that the same language held *not* to authorize injunctive relief in an antitrust statute does *not* authorize injunctive relief under RICO:

> We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4. . . . It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

Holmes v. SIPC, 503 U.S. 258, 268 (1992) (citations omitted).

C. Disregard of Text and History of RICO

1. RICO's Statutory Text

The remedies provision of RICO (18 U.S.C. § 1964) is set forth in the Appendix, Pet. App. 140a-41a.[11]

Subsection (a) confers jurisdiction upon the district courts and authorizes broad equitable remedies. This provision, however,

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[11]The version set forth in the Appendix was effective at the time the present lawsuit was filed. In 1995, Congress amended subsection (c) in a way irrelevant here. The 1995 amendment does not apply to actions, like the present suit, commenced prior to December 22, 1995.

does not specify who may seek the relief authorized.

Subsection (b) authorizes the U.S. Attorney General to "institute proceedings under this section." This subsection does not specify the ultimate relief the Attorney General may seek, and thus such relief plainly encompasses the full range of remedies for which subsection (a) creates jurisdiction.

Subsection (c) then specifies that "[a]ny person injured in his business or property . . . may sue therefor . . . and shall recover threefold the damages he sustains. . . ." Unlike subsection (b), there is no blanket authorization to institute proceedings; instead, the provision specifies a right to sue and a remedy, namely, treble damages. Subsections (b) and (c) are decidedly *not* parallel; hence, contrary to the court below, no "parity of reasoning," Pet. App. 111a, leads to the conclusion that private parties can claim the universe of relief authorized under subsection (a). Indeed, were the contrary true, private parties would be entitled to sue, not just for treble damages and injunctions, but also for such relief as dissolution of enterprises. *See* § 1964(a).[12]

The statutory text of RICO therefore indicates that Congress did *not* authorize private injunctive relief:

A frequently stated principle of statutory construction is that

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[12]The Seventh Circuit's reliance (Pet. App. 112a) on *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1990), is puzzling. That case merely held that a provision giving courts "jurisdiction in actions brought under [a subsection] . . . to enforce the requirement concerned" did not make every element of the pertinent substantive subsection "jurisdictional" such that failure of an element would defeat, not just the claim, but subject matter jurisdiction. *Id.* Petitioner made no such argument regarding RICO.

Meanwhile, the Seventh Circuit's reliance on RICO's "liberal construction" directive, Pet. App. 113a, is sheer makeweight, *see Reves v. Ernst & Young*, 507 U.S. 170, 183-84 (1993), as is the panel's invocation of broad "underlying purposes" of RICO, Pet. App. 114a.

> when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.

National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); *accord Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 731-32 (1989). For example, this Court has held that a statute expressly authorizing private citizens to sue for injunctions would not be construed as implying a private right of damages. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981). "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.* at 15. *Accord Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it").

This Court has consistently understood subsection (c) as authorizing a "private treble-damages action," *Sedima*, 473 U.S. at 486. *Accord id.* at 481, 487-88, 490, 493; *Agency Holding Corp.*, 483 U.S. at 151-52; *Klehr v. A. O. Smith Harvestore Products, Inc.*, 521 U.S. 179, 183 (1997); *Rotella v. Wood*, 528 U.S. 549, 551 (2000); *Beck v. Prupis*, 529 U.S. 494, 496 & n.1 (2000) (describing RICO provisions for criminal penalties and civil suits, and separately noting that RICO "authorizes *the Government* to bring civil actions to 'prevent and restrain' violations") (emphasis added). The decision below directly challenges this consistent understanding of civil RICO.

2. RICO's Legislative History

The legislative history of RICO confirms, indeed compels, the conclusion already drawn from the text of RICO: private

injunctive relief is not available under RICO.

a. Selection of treble damages remedy

RICO was enacted as Title IX of the Organized Crime Control Act of 1970. *Sedima*, 473 U.S. at 486. The Senate, which passed the legislation first, did not provide for private party suits under RICO.

> The civil remedies in the bill passed by the Senate, S. 30, were limited to injunctive actions by the United States and became §§ 1964(a), (b), and (d).

473 U.S. at 486-87. The "private treble-damages action" was added, later, in the House of Representatives. *Id.* at 487-88. The Senate then adopted the bill as amended in the House. *Id.* at 488. As the Fifth Circuit explained, "Section 1964(c), providing the treble damage remedy, then becomes a branch grafted onto the already-completed trunk of the statute." *Fredeman*, 843 F.2d at 829 (footnote omitted).

This "grafted-on branch" very specifically authorized "a private treble-damages action," *Sedima*, 473 U.S. at 487, as a supplement to federal government enforcement of the statute, and as a remedy for those wronged by organized crime, *id.* *See also Agency Holding Corp.*, 483 U.S. at 151 (RICO's civil enforcement provision was designed "to remedy economic injury by providing for the recovery of treble damages, costs and attorney's fees"); *id.* ("the mechanism chosen to reach the objective in . . . RICO is the carrot of treble damages"). The selection of a treble damages remedy, and *only* a treble damages remedy, was plainly a deliberate choice by Congress.

b. Rejection of private injunctive remedy

That Congress deliberately limited private civil relief to treble damages (and costs and attorney fees) appears even more clearly

from the rejection by Congress of proposals to authorize private injunctive relief:

> in considering civil RICO, Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress *rejected* the addition of any such provision.

Wollersheim, 796 F.2d at 1086 (emphasis in original).

RICO predecessor legislation in the Senate and in the House explicitly allowed for private party injunctive relief. *Id.* at 1084. *See* 115 Cong. Rec. 6,992-96 (1969) (discussing predecessor Senate bills); H.R. 19215, 91st Cong. 2d Sess. (1970) (predecessor House bill). In fact, Representative Steiger, who proposed the addition of the treble damages provision, *Sedima*, 473 U.S. at 487, made that proposal in an amendment which also included a provision for private injunctive relief. *See* 116 Cong. Rec. 27,738-39 (1970) (Steiger Amendment, proposed subsection (c), provided: "Any person may institute proceeding under subsection (a) [of § 1964] . . . [and] relief shall be granted in conformity with the principles which govern the granting of injunctive relief . . ."). The House Committee on the Judiciary, however, adopted only the private treble damages remedy, not the private injunctive remedy. *See* H.R. Rep. No. 1549, 91st Cong., 2d Sess. 58 (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4007, 4034. Rep. Steiger, while "extremely pleased . . . that the Judiciary Committee has approved . . . a provision authorizing treble damage actions by private persons," 116 Cong. Rec. 35,227 (1970), nevertheless lamented that the committee version did "not do the whole job," *id.* In particular, Rep. Steiger bemoaned the fact the "the Judiciary Committee version . . . fails to provide . . . equitable relief in suits brought by private citizens." *Id.* at 35,228.

On the floor of the House, Rep. Steiger again "offered an amendment that would have allowed private injunctive actions" under RICO, *Sedima*, 473 U.S. at 487. *See* 116 Cong. Rec. 35,228, 35,346 (1970). "The proposal was greeted with some hostility . . . and Steiger withdrew it without a vote being taken." *Sedima*, 473 U.S. at 487-88. *See* 116 Cong. Rec. 35,346-47 (1970). As this Court has explained, the reason for this hostility, for the withdrawal of the proposal, and for the reference of the proposal instead to a committee, was precisely because the proposed amendment "included yet another civil remedy," *Agency Holding Corp.*, 483 U.S. at 154, namely, private injunctive relief. *See* 116 Cong. Rec. 35,346 (1970) (statement of Rep. Poff) (Steiger amendment "does offer an additional civil remedy" and "prudence would dictate that the Judiciary Committee very carefully explore the potential consequences that this new remedy might have").[13]

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[13]Congress failed to enact legislation, proposed the very next term after the enactment of RICO, which was designed "to broaden even further the remedies available under RICO. In particular, it would have . . . permitted private actions for injunctive relief." *Agency Holding Corp.*, 483 U.S. at 155. *See also Sedima*, 741 F.2d at 489 n.20. *See* 117 Cong. Rec. 46,386 (1971) (statement of Sen. McClellan) (Title IV of "Victims of Crime Act of 1972" would "authorize private injunctive relief from racketeering activity"); *id.* at 46,393 (text of bill proposing to amend RICO to add private injunctive remedy); *Victims of Crime: Hearings on S. 16, S. 33, S. 750, S. 1946, S. 2087, S. 2426, S. 2748, S. 2856, S. 2994, and S. 2995 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 3 (1970-1971) (text of proposed bill providing for private injunctive relief under RICO); *id.* at 51 (same); *id.* at 158 (statement of Richard Velde, Associate Administrator, Law Enforcement Assistance Administration) (proposed legislation "would expand the available civil remedies. Section 1964 [of RICO] would be amended to permit any person to institute a civil proceeding to prevent or restrain violations. . . . Now only the United States can institute injunctive

(continued...)

In sum, Congress repeatedly declined to authorize private injunctive relief under RICO. *See Russello v. United States*, 464 U.S. 16, 23-24 (1983) (citing "evolution of [RICO's] statutory provisions" as aid to statutory construction, and adding, "[w]here Congress includes [certain] language in an earlier version of the bill but deletes it prior to enactment, it may be presumed that the [omitted text] was not intended").

D. Conflict with Department of Justice and Importance of the Question

As noted above, the Seventh Circuit has created a conflict in the circuits. And by in effect amending RICO to authorize private civil suits for injunctive relief, the Seventh Circuit has abolished the federal government's exclusive prerogative to seek such relief. Not only is this an affront to a unique federal executive power, it is an open invitation to abuse. Under the decision below, private parties are no longer limited to damages for the harm they suffered; they now can seek prospective relief wholly independent of, and potentially in conflict with, the decisions of the Attorney General regarding pursuit of such relief. Furthermore, private parties do not have the political accountability, or the duty to exercise prosecutorial discretion, that apply to the federal government. Hence, the RICO

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[13](...continued)
proceedings"); 118 Cong. Rec. 29,368 (1972) (text of "Civil Remedies for Victims of Racketeering Activity and Theft Act of 1972" proposing *inter alia* to amend RICO to add private injunctive relief); *id.* at 29,370 (statement of Sec. McClellan) (bill "authorizes private injunctive relief from racketeering activity").

In 1973, Congress again considered, and failed to enact, a bill to amend RICO by adding private injunctive relief. *See* 119 Cong. Rec. 10,317-19 (1973) ("Civil Remedies for Victims of Racketeering Activity and Theft Act of 1973").

injunctive weapon, thanks to the court below, can now be misused -- as in the present case -- as a means of waging political or commercial warfare against one's adversaries.

When this case was last before this Court, the Department of Justice argued that RICO does *not* authorize private injunctive relief, and that the Seventh Circuit should be reversed on this issue. Brief for United States as Amicus Curiae, § I (available at http://www.usdoj.gov/osg/briefs/2002/3mer/1ami/2001-1118.mer.ami.pdf). If this Court does not summarily reverse the Seventh Circuit for failure to comply with this Court's mandate, the question whether RICO authorizes private injunctive relief merits plenary review.

III. THE SEVENTH CIRCUIT'S HOLDING THAT THE HOBBS ACT MAY PLAUSIBLY BE READ TO PROHIBIT VIOLENCE UNCONNECTED TO EXTORTION OR ROBBERY DIRECTLY CONFLICTS WITH THE HOLDINGS OF TWO OTHER CIRCUITS AS WELL AS THE POSITION OF THE DEPARTMENT OF JUSTICE, RAISES AN IMPORTANT ISSUE, AND IS INDEFENSIBLE ON THE MERITS.

According to NOW, the Hobbs Act, 18 U.S.C. § 1951, which proscribes robbery and extortion (neither of which is present here), § 1951(a), also prohibits acts or threats of physical violence to any person or property *independent* of any robbery or extortion. The Seventh Circuit held that this was a defensible reading of the Hobbs Act. Pet. App. 8a-16a.

This construction of the Hobbs Act flies in the face of the plain text of the statute. The Hobbs Act, 18 U.S.C. § 1951(a) (Pet. App. 139a), may properly be parsed as follows (bracketed material and indentations added):

Whoever

> [i] in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or
>
> [ii] attempts or conspires so to do [i.e., to violate part i], or
>
> [iii] commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section [i.e., part i]
>
> shall be fined under this title or imprisoned not more than twenty years, or both.

Plainly, each of the three prongs of the offense relates, either expressly or by cross-reference, to robbery or extortion. By contrast, the Seventh Circuit's proposed construction, which would create a new offense of "violence" which "affects commerce," lacks grammatical parallelism, is awkward, and is incapable of coherent parsing.[14]

The Hobbs Act proscribes acts or threats of violence *only* "in furtherance of a plan or purpose to do anything in violation of this section," *id.*[15] "This section," of course, prohibits

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[14]The Seventh Circuit opined conclusorily that the "violence-in-furtherance" prong could, "without undue strain," Pet. App. 9a, grammatically be read not to require any link to robbery or extortion. Neither that court, nor respondents, however, have offered an alternative parsing of the text that would support such a construction, despite OR's challenge that no such parsing is available.

[15]The violence-in-furtherance" provision of the Hobbs Act covers, for example, the subordinate "enforcer" who, while not himself extorting anything, harms people or property when the extortionist does not obtain the desired payment from the victim. It also may be used to bring an additional criminal count, as where a defendant who has already committed the completed offense of extortion independently of any violence, e.g., "under color of official right," also threatens violence to person or property.

"obstruct[ing], delay[ing], or affect[ing]" commerce or the movement of any thing in commerce "by *robbery* or *extortion* or attempts or conspir[acies] *so to do*," *id.* (emphasis added). This parsing accords perfectly with the Hobbs Act as originally enacted:

> SEC 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> SEC 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> SEC 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> SEC 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose *to do anything in violation of section 2* shall be guilty of a felony.

Pub. L. No. 486, 60 Stat. 420 (1946) (emphasis added). As the Seventh Circuit conceded, when Congress in 1948 approved a general revision and codification of the entirety of Title 18, the "revisions were intended to be formal, stylistic changes," Pet. App. 15a.

NOW's faulty reading of the Hobbs Act excises the statutory text limiting the Hobbs act to robbery or extortion. Thus, NOW would read the Hobbs Act to make a federal crime of *any* act or threat of physical violence, to *any* person or property, whenever that act or threat "in any way or degree . . . affects commerce or the movement of any article or commodity in commerce," § 1951(a). This would make the Hobbs Act a breathtakingly broad general federal "anti-violence" statute.

Importantly, NOW's argument was squarely rejected in the

Sixth and Ninth Circuits in the only cases to assess the merits of this unlikely reading of the Hobbs Act. *Unites States v. Franks*, 511 F.2d 25 (6th Cir. 1975); *United States v. Yankowski*, 184 F.3d 1071 (9th Cir. 1999).

The Department of Justice also formally disavows NOW's proposed reading of the Hobbs Act. *See* Criminal Resource Manual 2402, *supra* page 8.

In sum, the impropriety of divorcing the Hobbs Act from extortion and robbery independently merits plenary review, should this Court not summarily reverse for failure to comply with its mandate.

* * *

This meritless but gargantuan lawsuit has drained the resources of courts and counsel for nearly 20 years now. This Court finally put a definitive end to the case, but the Seventh Circuit on remand has needlessly opened the door to still more, seemingly never-ending proceedings. It is time for this litigation to end.

CONCLUSION

This Court should grant certiorari and summarily reverse the decision below. In the alternative, this Court should grant plenary review.

Respectfully submitted,

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April 7, 2005

APPENDIX

APPENDIX A

United States Court of Appeals,
Seventh Circuit

NATIONAL ORGANIZATION FOR WOMEN, INC., et al., Plaintiffs-Appellees,

v.

Joseph M. SCHEIDLER, et al.,
Defendants-Appellants.

No. 99-3076, 99-3336, 99-3891, 99-3892, 01-2050

Jan. 28, 2005

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division. No. 86 C 7888 – David H. Coar, Judge.

On Petitions for Rehearing and Rehearing En Banc*

Before ROVNER, WOOD and EVANS, *Circuit Judges*.

WOOD, *Circuit Judge*. On February 26, 2004, this court issued an order responding to the remand of this case from the Supreme Court of the United States. *See Nat'l Org. for Women, Inc.* v. *Scheidler*, 2004 WL 375995 (7th Cir. Feb. 26, 2004), on remand from *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 397 (2003) (*NOW II*). In that order, we acknowledged the

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*After a vote, a majority of the judges in regular active service did not wish to hear this case *en banc*. Chief Judge Flaum, Judge Manion and Judge Kanne voted to grant rehearing *en banc*. Judge Ripple took no part in consideration or decision of this case.

issues that were resolved by the Supreme Court, and we identified one question that remains in the case. The defendants then filed petitions for rehearing and rehearing *en banc* from that order. This opinion responds to those petitions.

I

For the convenience of all, we begin by reproducing the relevant text of the unpublished order that we issued on that date:

> In 1986, the National Organization for Women (NOW) and two health clinics that perform abortions ("plaintiffs") filed this class action alleging that defendants, a coalition of antiabortion groups called the Pro-Life Action Network (PLAN), Joseph Scheidler, and other individuals and organizations that oppose abortion, engaged in conduct amounting to a pattern of extortion in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). A more detailed account of the facts and the lengthy procedural history of this litigation is provided in the Supreme Court's first opinion in this case, *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) (*NOW I*), and in our prior decisions, *National Organization for Women, Inc.* v. *Scheidler*, 267 F.3d 687 (7th Cir. 2001), and *National Organization for Women, Inc.* v. *Scheidler*, 986 F.2d 612 (7th Cir. 1992).
>
> After the Supreme Court in *NOW I* remanded the case, the district court conducted a seven-week trial, at which the plaintiffs introduced evidence of hundreds of acts committed by the defendants or others acting in concert with PLAN which, the plaintiffs contended, constituted predicate acts under RICO. In response to special interrogatories, the jury found that the defendants or others associated with PLAN committed 21 violations of federal extortion law (the Hobbs Act, 18 U.S.C. § 1951), 25 violations of state extortion law,

25 instances of attempting or conspiring to commit either federal or state extortion, 23 violations of the Travel Act, 18 U.S.C. § 1952, 23 instances of attempting to violate the Travel Act, and four "acts or threats of physical violence to any person or property." On this basis, the jury awarded damages to the two named clinics, and the district court issued a permanent nationwide injunction prohibiting the defendants from conducting blockades, trespassing, damaging property, or committing acts of violence at the class clinics. The defendants appealed a number of issues relating to the conduct of the trial and the issuance of the injunction. We affirmed the district court's judgment in all respects. *Scheidler*, 267 F.3d at 693.

The defendants then filed a petition for a writ of certiorari with the United States Supreme Court, which the Court granted with respect to two of the three questions presented by the petition. *Scheidler* v. *Nat'l Org. for Women, Inc.*, 535 U.S. 1016 (2002). The Court limited its grant of certiorari to the following questions:

1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under [RICO].

2. Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery or extortion" and which defines "extortion" as "the obtaining of property from another, with [the owner's] consent," where such consent is "induced by the wrongful use of actual or threatened force, violence, or fear" – criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.

Pet. for Writ of Cert., 2002 WL 32134867 (U.S. Jan. 28, 2002) (No. 01-1118) (internal citation omitted). In its opinion, the Court explained that it granted certiorari to determine "whether petitioners committed extortion within the meaning of the Hobbs Act" and "whether respondents, as private litigants, may obtain injunctive relief in a civil action" under RICO. *NOW II*, 537 U.S. at 397. The Court held that "petitioners did not commit extortion because they did not 'obtain' property from respondents as required by the Hobbs Act," and this determination "renders insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO." *Id.* It therefore "reverse[d] without reaching the question of the availability of private injunctive relief under § 1964(c) of RICO," *id.*, and held that "[w]ithout an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated," *id.* at 411.

On remand to this court, the parties submitted Statements of Position pursuant to Circuit Rule 54. Plaintiffs argue that, although the Court in *NOW II* disposed of the 117 extortion-based predicate acts under RICO, the defendants did not petition for a writ of certiorari on the four predicate acts involving "acts or threats of physical violence to any person or "property" and, accordingly, the Court did not decide whether these acts alone could support the district court's injunction. In response, defendants contend that the Hobbs Act does not outlaw "physical violence" apart from extortion and robbery, and therefore the Supreme Court's holding that the defendants did not commit extortion precludes a finding that the four acts or threats of violence might independently support the injunction. We remand to the district court to address this issue – which never before in this litigation has been the subject of full briefing or judicial consideration – in the first instance.

Although "[a]n order limiting the grant of certiorari does not operate as a jurisdictional bar," *Piper Aircraft Co.*

v. *Reyno*, 454 U.S. 235, 246 (1981), the Supreme Court has consistently adhered to its Rule 14.1(a), which provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." *See Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184, 202 (2002); *Glover* v. *U.S.*, 531 U.S. 198, 205 (2001). Given the Court's general refusal to decide issues outside the questions presented by a petition for a writ of certiorari, *see, e.g.*, *Lopez* v. *Davis*, 531 U.S. 230, 244 n.6 (2001); *West* v. *Gibson*, 527 U.S. 212, 233 (1999); *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 140 (1998), we will not presume that in this case it went beyond the scope of its grant of certiorari, which it characterized as "whether petitioners committed extortion within the meaning of the Hobbs Act," to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction. We note that the Courts' opinion in *NOW II* makes no mention of these four predicate acts, and the parties' briefs before the Court reference these acts only in passing in footnotes. To conclude that the Court found these four predicate acts insufficient to support the district court's injunction would therefore require that we find both that the Court went beyond the scope of its grant of certiorari, and that it did so with respect to an issue not briefed by the parties and not discussed in its opinion. We decline to draw such a conclusion.

Instead, we remand to the district court to determine whether the four predicate acts involving "acts or threats of physical violence to any person or property" are sufficient to support the nationwide injunction that it imposed. *See Glover*, 531 U.S. at 205 ("As a general rule . . . we do not decide issues outside the questions presented by the petition for certiorari. Whether these issues remain open, and if so whether they have merit, are questions for the Court of Appeals or the District Court to consider and determine in the first instance." (citing Sup. Ct. R. 14.1(a))). As part of

> this inquiry, the court may find it necessary to interpret the language of the Hobbs Act, which provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a). Specifically, the court may need to determine whether the phrase "commits or threatens physical violence to any person or property" constitutes an independent ground for violating the Hobbs Act or, rather, relates back to the grounds of robbery or extortion. In the alternative, the court may conclude that the proper interpretation of § 1951(a) is immaterial, if it decides that the four acts or threats of physical violence found by the jury are not sufficient standing alone to support the nationwide injunction. As the parties' Circuit Rule 54 submissions offer only a preliminary discussion of these issues, and neither this court nor the district court has addressed them previously, we consider it best to remand the case to the district court.

The February 26 order, in summary, thus concludes that one narrow question has yet to be resolved in the case. The Court did not have before it, and thus made no ruling on, the question whether four more predicate acts involving "acts or threats of physical violence to any person or property" could support a more narrow injunction. We concluded that the better part of wisdom was to remand that limited question to the district court.

II

The petitions for rehearing take issue with two aspects of our decision on remand: first, our finding that one issue remains in

the case that needs to be tied up, and second, what the defendants believe is our implicit resolution of an important question of statutory interpretation regarding the scope of the Hobbs Act. Despite the arguments the dissenting judges have presented, we continue to believe that the Court's opinion left open the issue we identified. We take this opportunity to underscore the fact that we have not, at this point, ruled either implicitly or explicitly on the Hobbs Act issue, for reasons of judicial economy and restraint. As we explain below, there is no need for this court to decide a question that may not even be pertinent to the case once the district court has looked at the points that remain on remand.

As we noted in the order reproduced above, the Supreme Court's opinion did not address the legal implications of the remaining four acts of physical violence. Indeed, any reader will see that the Court had nothing at all to say about them, for the understandable reason that they were not included in the petitions for *certiorari*. We have nothing to add on that point to what we have already written. With respect to the Hobbs Act dispute, which we describe in a moment, it seemed possible (perhaps even likely) that the district court might come to the conclusion that the four acts of physical violence are not sufficient standing alone to justify any injunction at all. It is not even clear whether the acts of violence were sufficiently well defined to justify any injunctive relief. Moreover, it is too late in the day for the plaintiffs to try to prove an entitlement to damages associated with those violations. They had their chance to do so when the case was tried in the district court, and there is nothing in the Supreme Court's opinion that would justify re-opening the original judgment on this point. The only remaining question, to repeat, is whether a different injunction, tailored to the violations found, would be appropriate. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70, 89 (1995). The district court is in the best position to decide what to do in these circumstances, given its extensive familiarity with the voluminous record in this case. This is not, however, an invitation either to the court or to the

parties to re-open that record. If there is anything at all that is to be done, it must be based on the record that has already been built.

If and only if the district court concludes that some form of injunctive relief would be justified based on the four remaining predicate acts found by the jury, that court will have to confront a more complex legal issue, namely, whether the acts or threats of violence language in the Hobbs Act may serve as an independent predicate act under RICO. The relevant part of the Hobbs Act reads as follows:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, *or commits or threatens physical violence* to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (emphasis added). As the defendants' petitions for rehearing and plaintiffs' answer demonstrate, there are two possible interpretations of this language. "First it may simply forbid committing or threatening violence in furtherance of a plan to obstruct commerce by robbery or extortion." Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 Sup. Ct. Rev. 129, 142-43 (1994). We will refer to this as the "two-way" interpretation, where the two acts are robbery and extortion. "The other possible reading . . . forbids threatening or committing physical violence in furtherance of a plan to 'obstruct, delay, or affect commerce' (other than through robbery or extortion)." *Id.* at 143. Under the latter reading, the Hobbs Act identifies three different ways in which illegal interference with interstate commerce may occur: (1) by robbery, (2) by extortion, or (3) by physical violence. We will refer to this as the "three-way" interpretation.

The choice between these two competing interpretations is

not obvious. Grammatically, the text can be read either way without undue strain. Moreover, there is no decisional law that throws light on which of the two readings is to be preferred. The Supreme Court has had no occasion to address the question. The Court has, however, had pertinent things to say about the scope of the Hobbs Act, and it has recently reaffirmed the utility of taking a "holistic" approach to questions of statutory interpretation, *see Koons Buick Pontiac GMC, Inc. v. Nigh*, 125 S. Ct. 460, 466-67 (2004). With that in mind, we take a closer look at this issue.

In *Stirone v. United States*, 361 U.S. 212 (1960), the Supreme Court described the Hobbs Act as follows: the "Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress had to punish interference with interstate commerce by extortion, robbery or physical violence." *Id.* at 215. This phraseology suggests that the Court saw three distinct types of predicate acts in the statute. *See also United States v. Peterson*, 236 F.3d 848, 851 (7th Cir. 2001); *United States v. Carmichael*, 232 F.3d 510, 516 (6th Cir. 2000); *United States v. Rodriguez*, 218 F.3d 1243, 1244 (11th Cir. 2000). None of these cases, however, squarely confronted the question whether an act of physical violence constitutes a distinct kind of predicate act – a point that the Ninth Circuit underscored in *United States v. Yankowski*, 184 F.3d 1071 (9th Cir. 1999), which held that *Stirone* did not resolve the issue and went on to adopt the two-way reading of the statute.

In their petition for rehearing, the defendants identify language in the Supreme Court's opinion in *NOW II* that, they argue, indicates that the Court itself has now opted for the two-way interpretation. But the passage to which they point offers at best a subtle indication, and at worst it is not helpful at all. In the course of discussing the legislative history of the Hobbs Act, the Court noted that Congress used the Penal Code of New York as a model for the Act. *NOW II* at 403. It emphasized that the New York Penal Code distinguished "between extortion and the separate crime of coercion," which "involved the use of force or

threat of force to restrict another's freedom of action." *Id.* at 405. "With this distinction between extortion and coercion clearly drawn in New York law prior to 1946," the Court explained, "Congress's decision to include extortion as a violation of the Hobbs Act and omit coercion is significant assistance to our interpretation of the breadth of the extortion provision." *Id.* at 406. The Court acknowledged that "coercion and extortion certainly overlap to the extent that extortion necessarily involves the use of coercive conduct to obtain property," but nonetheless it stressed that "there has been and continues to be a recognized difference between the two crimes, and we find it evident that this distinction was not lost on Congress." *Id.* at 407-08 (internal citations omitted). In drawing this conclusion and in declining to subsume the crime of coercion into the Hobbs Act's reference to "extortion," the Court quoted *McNally v. United States*, 483 U.S. 350 (1987), for the proposition that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *NOW II*, 537 U.S. at 409 (quoting *McNally*, 483 U.S. at 359-60); *see also Leocal v. Ashcroft*, 125 S. Ct. 377, 384 n.8 (2004). It thus concluded that "[i]f the distinction between extortion and coercion, which we find controls these cases, is to be abandoned, such a significant expansion of the law's coverage must come from Congress, and not from the courts." 537 U.S. at 409.

This discussion, however, addressed the question whether the definition of extortion was elastic enough to encompass the acts of coercion whereby the defendants and their allies were attempting to block women from clinics where abortions were performed. The focus was on the deprivation of the women's right to obtain the services they desired and whether that amounted to "extortion." It is true that the New York Penal Code defined coercion to include certain acts or threats of violence against persons or property, *see NOW II*, 537 U.S. at 406 n.10 (quoting from New York Penal Code § 530 (1909)).

It is also true that the Court concluded that Congress affirmatively chose not to list "coercion" as a separate ground for Hobbs Act liability. Nonetheless, the Court was not addressing the analytically distinct question whether the conduct at issue could be considered as acts of violence that obstructed, delayed, or affected interstate commerce, or that obstructed, delayed, or affected the movement of articles or commodities in commerce. Had it done so, one might have expected some discussion of cases like *United States v. Morrison*, 529 U.S. 598 (2000) (holding in part that the Violence Against Women Act could not be sustained as a regulation of activity affecting interstate commerce) and *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (upholding in part an injunction protecting access to abortion clinics entered pursuant to state law); *see also* 18 U.S.C. § 248 (freedom of access to clinics), upheld in *United States v. Wilson*, 154 F.3d 658 (7th Cir. 1998). No such discussion appears, for the simple reason that the issue was not before the Court.

The Sixth and Ninth Circuits have both had occasion to address the question how the Hobbs Act should be interpreted. *See United States v. Yankowski, supra*, 184 F.3d 1071; *United States v. Franks*, 511 F.2d 25 (6th Cir. 1975). They both have concluded that the Act establishes just two RICO predicate acts – robbery and extortion – and that the phrase "or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section" simply modified the words "robbery" and "extortion." In *Yankowski*, the Ninth Circuit considered the question whether an anti-abortion protester who set fire to a clinic roof could be convicted under the Hobbs Act. *See* 184 F.3d at 1072. The court rejected the three-part reading of the Act, explaining that "the statutory language clearly requires that the violent act pertain to a violation of *this section*, not merely to a violation of 'the law' generally." *Id.* at 1073. On that basis, it concluded that "[a] person may violate the Hobbs Act by committing or threatening a violent act against person or

property, but only if it is in furtherance of a plan to interfere with commerce *by extortion or robbery.*" *Id.* In support of that interpretation, the court relied on the language of the predecessor to the Hobbs Act, the Anti-Racketeering Act of 1934, which it described as providing that "[a]ny person who, in connection with or in any degree affecting trade or commerce (a) commits or attempts extortion of money, or (b) obtains property through extortion, or (c) 'commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b),' or (d) conspires with respect to (a), (b), or (c) . . . shall be imprisoned or fined." *Id.* at 1073 n.5. The Sixth Circuit came to essentially the same result in *Franks, supra.*

Notably, in both *Yankowski* and *Franks* the government had argued unsuccessfully that the statute described three independent predicate acts. It appears to us that the United States may still be taking that position with respect to the scope of the Hobbs Act for purposes of criminal prosecutions, though we cannot be sure without requesting the views of the Solicitor General. We note, however, that in an unpublished opinion, the Fourth Circuit stated that "[t]here are two essential elements of a Hobbs Act conviction: interference with interstate commerce, and a crime of robbery, extortion or violence." *United States v. Milton*, 153 F.3d 724, 1998 WL 468812, at *1 (4th Cir. Aug. 4, 1998). It seems likely that this court was expressing agreement with the position of the government, though once again, it is impossible to know.

The defendants also invoke the rule of lenity mentioned by the Supreme Court in *NOW II* and *Leocal* in support of the two-way interpretation. But this argument is premised on the doomsday scenario they foresee if the Act is read to permit three independent predicate acts. They predict that under the three-way interpretation, "the traditional state-law offenses of malicious destruction of property, reckless endangerment, and even assault would be Hobbs Act violation punishable by 20 years in federal prison." Operation Rescue adds that this would

make the Hobbs Act a "breathtakingly broad general federal anti-violence statute" and it would raise "obvious constitutional problems" under the Supreme Court's Commerce Clause jurisprudence. In our view, these predictions greatly overstate the case. The Hobbs Act itself contains a jurisdictional element that limits its application to anyone who "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a); *see also Jones v. United States*, 529 U.S. 848 (2000) (adopting a narrow interpretation of the federal arson statute, 18 U.S.C. § 844(i), to avoid constitutional problems). We are satisfied that we have a normal question of statutory interpretation before us and that the sky is not likely to fall whichever way it is resolved.

The plaintiffs argue that the "plain" text of § 1951 favors their position. They adopt the reasoning offered by Professor Bradley:

> [The Hobbs Act] may simply forbid committing or threatening violence in furtherance of a plan to obstruct commerce by robbery or extortion. But this interpretation makes no sense! Robbery and extortion frequently involve the commission (robbery) or threat (extortion) of violence, though "extortion" covers other threats as well. Moreover, the "robbery and extortion" clauses also forbid "attempts" and conspiracies. Thus, under this reading, the "physical violence" clause would be less inclusive, and hence would add nothing, to the preceding "robbery" and "extortion" clauses. One who commits violence in furtherance of a plan to commit robbery or extortion has either committed, attempted, or conspired to commit robbery or extortion and thus has violated the first clause, rendering the third clause nugatory.

Bradley, *supra*, at 142-43. At a minimum, it is hard to argue with the proposition that any reading of the Hobbs Act ought to take into account the statute as a whole. That means that the

language of § 1951(a) should be understood in light of the definitions provided by § 1951(b). In the latter subsection, the Act defines "robbery" and "extortion" so that they already cover all acts of physical violence that are undertaken in furtherance of the respective offense. "Robbery" is defined in part as "the unlawful taking or obtaining of personal property from the person . . . against his will, by means of *actual or threatened force, or violence, or fear of injury*, immediate or future, to his person or property." 18 U.S.C. § 1951(b)(1) (emphasis added). Likewise, "extortion" is defined as "the obtaining of property from another, with his consent, induced by wrongful use of *actual or threatened force, violence, or fear*, or under color of official right." *Id.* at § 1951(b)(2) (emphasis added).

Recognizing the well-worn canon of statutory interpretation under which a court should avoid making one part of a statute meaningless, the defendants have tried to think of cases in which the "physical violence" clause would cover individuals who were acting in furtherance of a plan to commit robbery or extortion, but whose acts do not already fall within the definitions of robbery, extortion, or attempts or conspiracies to rob or extort. Their efforts reveal the difficulty they face in this connection. Anyone who commits physical violence to a person or property in furtherance of a plan of robbery or extortion would almost certainly be found to have attempted one of those crimes, or, if others are involved, to have conspired to commit one or the other. Operation Rescue, for instance, offers the example of the "subordinate 'enforcer' who, while not himself extorting or robbing anything, harms people or property when the extortionist or robber does not obtain the desired payment from the victim." But such a subordinate "enforcer" would fall squarely within the Act's conspiracy language. Another example the defendants offer is the case of one who threatens violence in furtherance of a "personal" plan to rob a bank or to commit extortion, without either conspiring with anyone else or taking enough steps to amount to an attempted crime. It is hard to see how such a remote threat could be in furtherance either of

extortion or robbery (defendants' view) or in furtherance of a plan to "obstruct, delay" or otherwise hamper the movement of goods in commerce (plaintiffs' view). It seems unlikely that Congress included the "violence" language to capture such a tiny set of academic hypotheticals.

Even if one were to conclude that the plain language approach favors the interpretation urged by the plaintiffs, there is still legislative history to consider. The defendants argue that the legislative history of the Hobbs Act should be allowed to trump the result one reaches looking at the statute as a whole. Many judges believe that legislative history should be used, if at all, only to disambiguate language that does not yield to any other mechanism. The Supreme Court's *Koons Buick* decision indicates that legislative history is also appropriate if the plain language leads one to an absurd result. But we see nothing absurd in the three-way interpretation the plaintiffs have urged. To the contrary, it is the approach favored by the defendants that threatens to leave one with an entire clause in the statute that has no meaningful function to perform.

Having said that, we acknowledge that the legislative history indicates that Congress was principally concerned with the effects of robbery and extortion on interstate commerce (though it never affirmatively negated the three-way interpretation, either at the time of the 1948 revision of the Criminal Code or thereafter). *See generally Callanan v. United States*, 364 U.S. 587, 591 & n.5 (1961). Until the 1948 revision and codification of Title 18 of the U.S. Code, the statute explicitly linked the "acts of physical violence" clause to the prohibition on robbery and extortion. *See* Pub. L. No. 486, 60 Stat. 420 (1946). In 1948, however, the Act assumed its present form. See Pub. L. No. 772, 62 Stat. 793-94 (1948). While these revisions were intended to be formal, stylistic changes, it is not beyond the realm of possibility that the revisers may have made certain substantive changes, either advertently or inadvertently. Compare, for example, the similar fate of the Judicial Code, which was recodified at the same time as the Criminal Code, and

which changed in a number of substantive respects as a result. *See generally* William W. Barron, The Judicial Code, 8 F.R.D. 439 (1948-49). Moreover, the present form of the Act has been in effect for more than 55 years, and the safest approach may be to take it at face value.

III

We continue to believe, as we did when the February 26 order was issued, that it would be imprudent to resolve this problem of statutory interpretation at this stage of the litigation of this particular case. Most importantly, as we indicated at the outset of this opinion, it may be unnecessary to the resolution of this case. Second, the brief discussion we have included in this opinion demonstrates that the issue is a complex one that deserves not only full briefing and participation by all parties, but also input from the United States, given the effect of any ruling on the scope of the Hobbs Act with or without RICO in the picture. Rather than launch such an ambitious project at the tail end of litigation that has been running for almost twenty years, we prefer a wait-and-see approach.

In closing, we wish to re-emphasize that this remand is not a "green light" to start this old litigation anew. The plaintiffs have lost their bid to have a nationwide injunction based on the 117 acts that the Supreme Court has now decreed do not qualify as "extortion" for purposes of the Hobbs Act and RICO. From what we can tell of the record, it appears that it would be an abuse of discretion for the district court to re-enter any nationwide injunction based only on the four remaining acts of violence found by the jury. Such an injunction would violate the rule requiring courts to tailor injunctive relief to the scope of the violation found. We note as well that the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, has now been in effect for five more years since the district court first considered the necessity of a nationwide injunction, and experience may require a reassessment of the Act's impact. Finally, it is too late in the

day for the plaintiffs to try to seek additional damages relief for acts that they could have addressed at the original trial. The only remaining question is therefore whether any injunction is appropriate to redress the four acts of physical violence that the jury found had taken place and that were not encompassed within the Supreme Court's ruling. This does not open Pandora's Box. It merely resolves the final loose ends in this long-running litigation in a manner that is fair to both sides and that acknowledges the need to resolve all properly presented issues.

The case is REMANDED to the district court for further proceedings consistent with this opinion.

MANION, *Circuit Judge*, joined by KANNE, *Circuit Judge*, dissenting from the denial of petition to rehear en banc. Following more than eighteen years of litigation, a seven-week jury trial, and two trips to the United States Supreme Court, the Supreme Court held in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), that "*all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed*," and that "*[w]ithout an underlying RICO violation*, the injunction issued by the District Court must necessarily be vacated." *Id.* at 410 (emphasis added). Nonetheless, on remand, a panel of this court concluded that not "*all* of the predicate acts" were reversed, but that the jury's finding of four predicate acts or threats of violence remained viable. *National Org. for Women, Inc. v. Scheidler*, 2004 WL 375995, at *3 (7th Cir. Feb. 26, 2004). Today on rehearing, the panel reaffirms that remand order, while unnecessarily debating, but not deciding, the scope of the Hobbs Act. Because I believe that the Supreme Court meant what it said, and because, in any event, the underlying four predicate acts of violence cannot, as a matter of law, constitute an independent violation of the Hobbs Act, I dissent from the denial of the petition for rehearing en banc.

The facts and procedural history of this case are provided in detail in the Supreme Court's decision in *Scheidler*. In short, in

Scheidler, following a seven-week trial, a jury concluded that Scheidler and other individuals and organizations violated the civil provisions of RICO: the jury concluded that the defendants committed 21 violations of the Hobbs Act, 25 violations of state extortion law, 25 instances of attempting or conspiring to commit either federal or state extortion, 23 violations of the Travel Act, 23 instances of attempting to violate the Travel Act, and four acts or threats of physical violence to any person or property.[1] The jury awarded plaintiff, the National Women's Health Organization of Delaware, Inc., $31,455.64, and the National Women's Health Organization of Summit, Inc., $54,471.28, with the damages trebled under RICO. The district court then entered an injunction prohibiting certain illegal protest actions. The defendants appealed to this court and this court affirmed. *National Org. for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001). The Supreme Court granted certiorari "to answer two questions. First, whether petitioners committed extortion within the meaning of the Hobbs Act, 18 U.S.C. § 1951. Second, whether respondents, as private litigants, may obtain injunctive relief in a civil action pursuant to 18 U.S.C. § 1964 of the Racketeer Influenced and Corrupt Organization Act (RICO)." *Id.* at 397.

On appeal, the Supreme Court first considered whether the defendants committed extortion within the meaning of the Hobbs Act. The Court held that the crime of extortion under the Hobbs Act required the defendants to obtain or to seek to obtain property. The Court then concluded: "Because we find that petitioners did not obtain or attempt to obtain property from respondents, we conclude that there was no basis upon which to find that they committed extortion under the Hobbs Act." *Id.* The Court did not end there, however, because "[t]he jury also found that petitioners had committed extortion under various

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[1]The plaintiffs acknowledge that the "acts or threats of physical violence" predicate acts were based on the Hobbs Act, 18 U.S.C. § 1951(a), and were not state law claims.

state-law extortion statutes, a separate RICO predicate offense." *Id.* at 409. Thus, the Court considered whether the verdicts could stand based on the jury's findings of state law extortion. Again, the Court concluded "[b]ecause petitioners did not obtain or attempt to obtain respondents' property, both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed." *Id.* at 410. Having disposed of the Hobbs and state extortion predicate acts, the Supreme Court then concluded that "[t]he 23 violations of the Travel Act and 23 acts of attempting to violate the Travel Act also fail. These acts were committed in furtherance of allegedly extortionate conduct. But we have already determined that petitioners did not commit or attempt to commit extortion." *Id.* at 410.

Significantly, the Supreme Court then held: "Because *all* of the predicate acts supporting the jury's findings of a RICO violation *must be reversed*, the judgment that petitioners violated RICO *must also be reversed*. Without an underlying RICO violation, the injunction issued by the District Court *must necessarily be vacated*. We therefore need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964. The judgment of the Court of Appeals is accordingly *Reversed*." *Id.* at 411 (emphasis added). The Supreme Court then entered an order stating "that the judgment of the above court in these cases is reversed with costs, and the cases are remanded to the United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court." At that point, we should have closed the case.

But even with the Supreme Court's explicit holding that "*all* of the predicate acts supporting the jury's findings of a RICO violation *must be reversed*," and its directive that "the injunction issued by the District Court *must necessarily be vacated*," our court remanded this case to the district court for further proceedings, namely to determine "whether the four predicate acts involving 'acts or threats of physical violence to any person

or property' are sufficient to support the nationwide injunction that it imposed." *Scheidler*, 2004 WL 375995, at *3. The panel reasoned that remand was necessary because the Supreme Court had not granted certiorari on that issue and, therefore, the question remained open. In my view, the order directly conflicts with the Supreme Court's opinion. It also rests on an impermissible reading of the Hobbs Act, and unnecessarily revives a case that is already more than eighteen years old.

Although the Supreme Court did not expressly consider whether the jury's finding of four predicate acts of violence to persons or property could support the jury's verdict on the plaintiffs' RICO claim, the Supreme Court clearly stated that "*all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed.*" This unequivocal holding negates any reasonable inference that those four predicate acts remain an issue. The panel concludes otherwise by noting that the Supreme Court did not grant certiorari to resolve that issue.

But, the Supreme Court did specifically grant certiorari to consider the question of whether a private litigant in a civil RICO action is entitled to injunctive relief, but then found it unnecessary to address that question because there was no "underlying RICO violation . . . ." *Scheidler*, 537 U.S. at 411. This is significant because if the four threats or acts of violence claims remained viable, as the panel concludes and the plaintiffs argue, there would be an "underlying RICO violation," and it would have been necessary for the Supreme Court to address the second question for which it had granted certiorari. Yet, the Supreme Court expressly stated that because there was no underlying RICO violation, it was unnecessary to consider whether private litigants could obtain injunctive relief under RICO. *Id.* at 411. Thus, the panel's remand order, which allows for the possibility that there is still an "underlying RICO violation," is again inconsistent with the Supreme Court's opinion.

Moreover, although the Supreme Court did not grant certiorari to consider the state law extortion claims or the Travel

Act claims, it nonetheless considered the validity of those claims, as they depended entirely on the Supreme Court's resolution of the extortion claims for which it had granted certiorari. *See Scheidler*, 537 U.S. at 410 ("The 23 violations of the Travel Act and 23 acts of attempting to violate the Travel Act also fail. These acts were committed in furtherance of allegedly extortionate conduct. But we have already determined that petitioners did not commit or attempt to commit extortion."); *id.* ("Because petitioners did not obtain or attempt to obtain respondents' property, both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed."). Similarly, as discussed below, the four predicate acts of violence to persons or property depend on the viability of the extortion claims in this case. By holding that the defendants did not commit extortion, it necessarily follows that the four predicate acts also cannot support the RICO verdict. True, the Supreme Court expressly addressed the state law extortion claims and the Travel Act claims, but did not mention the four violence against person or property claims. But that is not surprising given that on appeal before the Supreme Court, the plaintiffs discussed those claims, and specifically argued that "even without the Hobbs Act predicates, the jury's verdict would stand on the 25 state extortion predicates." The plaintiffs, however, did not argue that the four predicate acts of violence against persons or property independently justified the jury's verdict. Therefore, the Supreme Court found no need to expressly address that question. But its holding that "all of the predicate acts supporting the jury's finding of a RICO violation must be reversed . . ." is conclusive.

One could argue that the Supreme Court made a mistake when it stated that "*all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed*," and that "*[w]ithout an underlying RICO violation*, the injunction issued by the District Court must necessarily be vacated." *Scheidler*, 537 U.S. at 411 (emphasis added). But if so, the appropriate procedure would have been for the plaintiffs to seek rehearing

from the Supreme Court. This court cannot ignore the Supreme Court's mandate merely because the Supreme Court might not have meant what it said.

Even assuming that the panel's remand order could be labeled a reasonable interpretation of the Supreme Court's opinion, the four predicate acts of violence to persons or property cannot, as a matter of law, constitute a violation of the Hobbs Act, as the plaintiffs argue. Specifically, the plaintiffs argue that the Hobbs Act make it illegal to interfere with interstate commerce by: (1) robbery, (2) extortion, or (3) physical violence. The plaintiffs' argument is misplaced, as the plain language of the Hobbs Act makes clear.

The Hobbs Act provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951.

The plain language of the Hobbs Act makes clear that it does not make threats of "physical violence to any person or property" illegal. Rather, it prohibits threats of "physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section*." Thus, for the four acts or threats of violence to constitute a violation of the Hobbs Act, they must have been for purposes of obstructing, delaying or affecting commerce "by robbery or extortion." *United States v. Yankowski*, 184 F.3d 1071 (9th Cir. 1999); *United States v. Franks*, 511 F.2d 25 (6th Cir. 1975). Yet, the Supreme Court held that the facts in this case did not support a finding of extortion, as a matter of law. (And the plaintiffs do not make a claim of robbery.) Accordingly, there is no possible Hobbs Act

violation and the remaining four predicate acts, like the Travel Act claims, cannot, as a matter of law, support a RICO verdict.[2]

Nonetheless, on rehearing the panel unnecessarily sets up a debate on the meaning of the Hobbs Act, positing as plausible two different interpretations of the Hobbs Act – what the panel dubs a "two-way" and a "three-way" interpretation. *Scheidler* slip op. at 9. Using the panel's jargon, a "two-way" interpretation of the Hobbs Act allows for only two independent ways to violate the Hobbs Act: 1) Robbery or 2) Extortion. The three-way interpretation, according to the panel, provides for a third: 3) Physical violence to any person or property.

Although the panel refuses to resolve the debate and instead "underscore[s] the fact that we have not, at this point, ruled either implicitly or explicitly on the Hobbs Act issue," slip op. at 7, the panel nonetheless states that "[g]rammatically, the text can be read either way without undue strain," *id.* at 9, and it

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[2]There is yet another reason that further proceedings on remand are unnecessary. In remanding the Hobbs Act question, the panel on rehearing instructs that "[i]f there is anything at all that is to be done, it must be based on the record that has already been built." Slip op. at 8. However, the record, as it currently exists, fails to establish that the four acts of violence involved interstate commerce. As the panel recognizes, slip op. at 13, the Hobbs Act violation must "affect[] commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a). In this case, though, the jury did not determine that the four acts or violence affected commerce: The Special Interrogatories and Verdict Form did not ask the jury to decide separately whether each alleged predicate act involved interstate commerce. Rather, Special Interrogatory 8 asked whether "any of the acts that you found in Question 4 above affect[ed] interstate commerce?" The jury answered "yes" to that question, but the jury did not specify which of the acts listed in Interrogatory 4 affected interstate commerce. Interrogatory 4 included eight sub-components, (a)–(h), only one of which involved the acts or threats of physical violence to any person or property, which the remand order indicates remain viable. Because the jury did not specifically conclude that those acts affected interstate commerce, on the record as it stands, no Hobbs Act violation could exist.

concludes that "we see nothing absurd in the three-way interpretation the plaintiffs have urged." *Id.* at 16. However, contrary to the panel's conclusion, the three-way interpretation is not plausible given the plain language of the Hobbs Act. As explained above, the "physical violence to any person or property" clause of the Hobbs Act, states in its entirety: "or commits or threatens physical violence to any person or property in furtherance of a plan or purpose *to do anything in violation of this section*, . . ." Thus, the only way "physical violence" constitutes a violation of the Hobbs Act is if it (in addition to satisfying the interstate commerce requirement) is in furtherance of "robbery" or "extortion.["] *Yankowski*, 184 F.3d 1071; *Franks*, 511 F.2d 25. Clearly, under the Hobbs Act, physical violence to any person or property is confined to furthering robbery or extortion. It does not stand alone as a separate violation. The full court should decide this clear question of law now, instead of presenting competing theories for the district court to resolve on remand.

Although an order for a reversal and remand from the Supreme Court is not the typical case for which *en banc* is appropriate, procedurally that is the only option available to the defendants before this court. Given the age of this case, remanding to the district court unnecessarily wastes additional judicial resources. Granted, it is hard to see how four acts of violence committed nearly twenty years ago – and well before Congress enacted the Freedom of Access to Clinic Entrances Act – would justify an injunction in 2005. It is likely and certainly appropriate that the district court will dispose of the case promptly on that basis. But even that most likely result requires additional resources of the parties and the judicial system. This is unnecessary because the Supreme Court's holding that there was no extortion means that no Hobbs Act violation possibly exists. Moreover, if the district court on remand somehow finds an injunction appropriate, then it will be required to choose between the two legal options the panel presents. The losing side would surely appeal, presenting the pure issue of law that

this court would have resolved by now had we considered it en banc.

Absent a writ of mandamus from the United States Supreme Court, *see In re Blodgett*, 502 U.S. 236, 240-41 (1992) (denying a petition for the writ of mandamus directed toward the Ninth Circuit without prejudice, but stating that such relief would be available if the circuit court caused an unwarranted delay in the case's disposition), the defendants face an unnecessary remand. I therefore DISSENT from the denial of rehearing en banc. *Id.*

APPENDIX B

United States Court of Appeals,
Seventh Circuit

NATIONAL ORGANIZATION FOR WOMEN, INC., et al., Plaintiffs-Appellees,

v.

Joseph M. SCHEIDLER, et al.,
Defendants-Appellants.

Nos. 99-3076, 99-3336, 99-3891, 99-3892, 01-2050

Submitted Feb. 26, 2003.
Decided Feb. 26, 2004.

On Remand from the Supreme Court of the United States

Before ROVNER, DIANE P. WOOD, and EVANS, Circuit Judges.

ORDER

This case comes to us on remand from the Supreme Court of the United States.

In 1986, the National Organization for Women (NOW) and two health clinics that perform abortions ("plaintiffs"), filed this class action alleging that defendants, a coalition of antiabortion groups called the Pro-Life Action Network (PLAN), Joseph Scheidler, and other individuals and organizations that oppose abortion, engaged in conduct amounting to a pattern of extortion in violation of the Racketeer Influenced and Corrupt

Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). A more detailed account of the facts and the lengthy procedural history of this litigation is provided in the Supreme Court's first opinion in this case, *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) (*NOW I*), and in our prior decisions, *National Organization for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001), and *National Organization for Women, Inc. v. Scheidler*, 968 F.2d 612 (7th Cir. 1992).

After the Court in *NOW I* remanded the case, the district court conducted a seven-week trial, at which the plaintiffs introduced evidence of hundreds of acts committed by the defendants or others acting in concert with PLAN which, the plaintiffs contended, constituted predicate acts under RICO. In response to special interrogatories, the jury found that the defendants or others associated with PLAN committed 21 violations of federal extortion law (the Hobbs Act, 18 U.S.C. § 1951), 25 violations of state extortion law, 25 instances of attempting or conspiring to commit either federal or state extortion, 23 violations of the Travel Act, 18 U.S.C. § 1952, 23 instances of attempting to violate the Travel Act, and four "acts or threats of physical violence to any person or property." On this basis, the jury awarded damages to the two named clinics, and the district court issued a permanent nationwide injunction prohibiting the defendants from conducting blockades, trespassing, damaging property, or committing acts of violence at the class clinics. The defendants appealed a number of issues relating to the conduct of the trial and the issuance of the injunction. We affirmed the district court's judgment in all respects. *Scheidler*, 267 F.3d at 693.

The defendants then filed a petition for a writ of certiorari with the United States Supreme Court, which the Court granted with respect to two of the three questions presented by the petition. *Scheidler v. Nat'l Org. for Women, Inc.*, 535 U.S. 1016

(2002). Specifically, the Court limited its grant of certiorari to the following questions:

> 1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under [RICO].
>
> 2. Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery or extortion" and which defines "extortion" as "the obtaining of property from another, with [the owner's] consent," where such consent is "induced by the wrongful use of actual or threatened force, violence, or fear" – criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.

Pet. for Writ of Cert., 2002 WL 32134867 (U.S. Jan 28, 2002) (No. 01-1118) (internal citation omitted). In its opinion, the Court explained that it granted certiorari to determine "whether petitioners committed extortion within the meaning of the Hobbs Act" and "whether respondents, as private litigants, may obtain injunctive relief in a civil action" under RICO. *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 397 (2003) (*NOW II*). The Court held that "petitioners did not commit extortion because they did not 'obtain' property from respondents as required by the Hobbs Act," and this determination "renders insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO." *Id.* It therefore "reverse[d] without reaching the question of the

availability of private injunctive relief under § 1964(c) of RICO," *id.*, and held that "[w]ithout an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated," *id.* at 411.

On remand to this court, the parties submitted Statements of Position pursuant to Circuit Rule 54. Plaintiffs argue that, although the Court in *NOW II* disposed of the 117 extortion-based predicate acts under RICO, the defendants did not petition for a writ of certiorari on the four predicate acts involving "acts or threats of physical violence to any person or property" and, accordingly, the Court did not decide whether these acts alone could support the district court's injunction. In response, defendants contend that the Hobbs Act does not outlaw "physical violence" apart from extortion and robbery, and therefore the Supreme Court's holding that the defendants did not commit extortion precludes a finding that the four acts or threats of violence might independently support the injunction. We remand to the district court to address the issue – which never before in this litigation has been the subject of full briefing or judicial consideration – in the first instance.

Although "[a]n order limiting the grant of certiorari does not operate as a jurisdictional bar," *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 (1981), the Supreme Court has consistently adhered to its Rule 14.1(a), which provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 202 (2002); *Glover v. U.S.*, 531 U.S. 198, 205 (2001). Given the Court's general refusal to decide issues outside the questions presented by a petition for a writ of certiorari, *see, e.g., Lopez v. Davis*, 531 U.S. 230, 244 n.6 (2001); *West v. Gibson*, 527 U.S. 212, 223 (1999); *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 140 (1998), we will not presume that in this case it went beyond the scope of its grant of

certiorari, which it characterized as "whether petitioners committed extortion within the meaning of the Hobbs Act," to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction. We note that the Court's opinion in *NOW II* makes no mention of these four predicate acts, and the parties' briefs before the Court reference these acts only in passing in footnotes. To conclude that the Court found these four predicate acts insufficient to support the district court's injunction would therefore require that we find both that the Court went beyond the scope of its grant of certiorari, and that it did so with respect to an issue not briefed by the parties and not discussed in its opinion. We decline to draw such a conclusion.

Instead, we remand to the district court to determine whether the four predicate acts involving "acts or threats of physical violence to any person or property" are sufficient to support the nationwide injunction that it imposed. *See Glover*, 531 U.S. at 205 ("As a general rule . . . we do not decide issues outside the questions presented by the petition for certiorari. Whether these issues remain open, and if so whether they have merit, are questions for the Court of Appeals or the District Court to consider and determine in the first instance." (citing Sup. Ct. R. 14.1(a))). As part of this inquiry, the court may find it necessary to interpret the language of the Hobbs Act, which provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a). Specifically, the court may need to determine whether the phrase "commits or threatens physical violence to

any person or property" constitutes an independent ground for violating the Hobbs Act or, rather, relates back to the grounds of robbery or extortion. In the alternative, the court may conclude that the proper interpretation of § 1951(a) is immaterial, if it decides that the four acts or threats of physical violence found by the jury are not sufficient standing alone to support the nationwide injunction. As the parties' Circuit Rule 54 submissions offer only a preliminary discussion of these issues, and neither this court nor the district court has addressed them previously, we consider it best to remand the case to the district court.

We therefore REMAND this case to the district court for further proceedings consistent with *NOW II* and this order.

APPENDIX C

SCHEIDLER

v.

NATIONAL ORGANIZATION FOR WOMEN, INC.

Nos. 01-1118 and 01-1119

SUPREME COURT OF THE UNITED STATES

December 4, 2002, Argued
February 26, 2003, Decided

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. GINSBURG, J., filed a concurring opinion, in which BREYER, J., joined. STEVENS, J., filed a dissenting opinion.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in these cases to answer two questions. First, whether petitioners committed extortion within the meaning of the Hobbs Act, 18 U.S.C. § 1951. Second, whether respondents, as private litigants, may obtain injunctive relief in a civil action pursuant to 18 U.S.C. § 1964 of the Racketeer Influenced and Corrupt Organizations Act (RICO). We hold that petitioners did not commit extortion because they did not "obtain" property from respondents as required by the Hobbs

Act. We further hold that our determination with respect to extortion under the Hobbs Act renders insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO. Therefore, we reverse without reaching the question of the availability of private injunctive relief under § 1964(c) of RICO.

We once again address questions arising from litigation between petitioners, a coalition of antiabortion groups called the Pro-Life Action Network (PLAN), Joseph Scheidler and other individuals and organizations that oppose legal abortion,[1] and respondents, the National Organization for Women, Inc. (NOW), a national nonprofit organization that supports the legal availability of abortion, and two health care centers that perform abortions.[2] Our earlier decision provides a substantial description of the factual and procedural history of this litigation, *see National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994), and so we recount only those details necessary to address the questions here presented.

In 1986, respondents sued in the United States District Court for the Northern District of Illinois alleging, inter alia, that petitioners violated RICO's §§ 1962(a), (c), and (d). They claimed that petitioners, all of whom were associated with PLAN, the alleged racketeering enterprise, were members of a nationwide conspiracy to "shut down" abortion clinics through

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[1]The other petitioners include Andrew Scholberg, Timothy Murphy, and Operation Rescue.

[2]NOW represents a certified class of all NOW members and non-members who have used or would use the services of an abortion clinic in the United States. The two clinics, the National Women's Health Organization of Summit, Inc., and the National Women's Health Organization of Delaware, Inc., represent a class of all clinics in the United States at which abortions are provided.

a pattern of racketeering activity that included acts of extortion in violation of the Hobbs Act.[3]

The District Court dismissed respondents' RICO claims for failure to allege that the predicate acts of racketeering or the racketeering enterprise were economically motivated. *See National Organization for Women, Inc. v. Scheidler*, 765 F. Supp. 937 (ND Ill. 1991). The Court of Appeals for the Seventh Circuit affirmed that dismissal. *See National Organization for Women, Inc. v. Scheidler*, 968 F.2d 612 (1992). We granted certiorari and reversed, concluding that RICO does not require proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose. *See Scheidler*, 510 U.S. at 256-262. The case was remanded to the District Court for further proceedings.

After a 7-week trial, a six-member jury concluded that petitioners violated the civil provisions of RICO. By answering a series of special interrogatory questions, the jury found, inter alia, that petitioners' alleged "pattern of racketeering activity" included 21 violations of the Hobbs Act, 18 U.S.C. § 1951; 25 violations of state extortion law; 25 instances of attempting or conspiring to commit either federal or state extortion; 23 violations of the Travel Act, 18 U.S.C. § 1952; and 23 instances of attempting to violate the Travel Act. The jury awarded $31,455.64 to respondent, the National Women's Health Organization of Delaware, Inc., and $54,471.28 to the

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[3]The Hobbs Act, 18 U.S.C. § 1951(a), provides that "whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both."

National Women's Health Organization of Summit, Inc. These damages were trebled pursuant to § 1964(c). Additionally, the District Court entered a permanent nationwide injunction prohibiting petitioners from obstructing access to the clinics, trespassing on clinic property, damaging clinic property, or using violence or threats of violence against the clinics, their employees, or their patients.

The Court of Appeals for the Seventh Circuit affirmed in relevant part. The Court of Appeals rejected petitioners' contention that the things respondents claimed were "obtained" -- the class women's right to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their business -- were not "property" for purposes of the Hobbs Act. The court explained that it had "repeatedly held that intangible property such as the right to conduct a business can be considered 'property' under the Hobbs Act." *NOW, Inc. v. Scheidler*, 267 F.3d 687, 709 (2001). Likewise, the Court of Appeals dismissed petitioners' claim that even if "property" was involved, petitioners did not "obtain" that property; they merely forced respondents to part with it. Again relying on Circuit precedent, the court held that "'as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required.'" *Ibid.* (quoting *United States v. Stillo*, 57 F.3d 553, 559 (CA7 1995)). Finally, the Court of Appeals upheld the issuance of the nationwide injunction, finding that private plaintiffs are entitled to obtain injunctive relief under § 1964(c) of RICO. We granted certiorari, 535 U.S. 1016 (2002), and now reverse.

We first address the question whether petitioners' actions constituted extortion in violation of the Hobbs Act. That Act

defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Petitioners allege that the jury's verdict and the Court of Appeals' decision upholding the verdict represent a vast and unwarranted expansion of extortion under the Hobbs Act. They say that the decisions below "read the requirement of 'obtaining' completely out of the statute" and conflict with the proper understanding of property for purposes of the Hobbs Act. Brief for Petitioners Joseph Scheidler et al. in No. 01-1118, pp. 11-13.

Respondents, throughout the course of this litigation, have asserted, as the jury instructions at the trial reflected,[4] that petitioners committed extortion under the Hobbs Act by using or threatening to use force, violence, or fear to cause respondents "to give up" property rights, namely, "a woman's right to seek medical services from a clinic, the right of the doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion and fear." Jury Instruction No. 24, App. 136. Perhaps recognizing the apparent difficulty in reconciling either its position that "giving up" these alleged property rights or the Court of Appeals' holding that "interfering with such rights" with the requirement that

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[4]The instruction given to the jury regarding extortion under the Hobbs Act provided that "plaintiffs have alleged that the defendant and others associated with PLAN committed acts that violate federal law prohibiting extortion. In order to show that extortion has been committed in violation of federal law, the plaintiffs must show that the defendant or someone else associated with PLAN knowingly, willfully, and wrongfully used actual or threatened force, violence or fear to cause women, clinic doctors, nurses or other staff, or the clinics themselves to give up a 'property right.'" Jury Instruction No. 24, App. 136.

petitioners "obtained . . . property from" them, respondents have shifted the thrust of their theory. 267 F.3d at 687. Respondents now assert that petitioners violated the Hobbs Act by "seeking to get control of the use and disposition of respondents' property." Brief for Respondents 24. They argue that because the right to control the use and disposition of an asset is property, petitioners, who interfered with, and in some instances completely disrupted, the ability of the clinics to function, obtained or attempted to obtain respondents' property.

The United States offers a view similar to that of respondents, asserting that "where the property at issue is a business's intangible right to exercise exclusive control over the use of its assets, [a] defendant obtains that property by obtaining control over the use of those assets." Brief for United States as Amicus Curiae 22. Although the Government acknowledges that the jury's finding of extortion may have been improperly based on the conclusion that petitioners deprived respondents of a liberty interest,[5] it maintains that under its theory of liability, petitioners committed extortion.

We need not now trace what are the outer boundaries of extortion liability under the Hobbs Act, so that liability might be based on obtaining something as intangible as another's right to exercise exclusive control over the use of a party's business

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[5]The Solicitor General agreed at oral argument that even if we accept the Government's view as to extortion under the Hobbs Act, the case must be remanded because the generalized jury instruction regarding federal extortion included a woman's right to seek medical services as a property right petitioners' could extort from respondents; a right he acknowledged is more accurately characterized as an individual liberty interest. *See* Tr. of Oral Arg. 30-31.

assets.[6] Our decisions in *United States v. Green*, 350 U.S. 415, 420 (1956) (explaining that "extortion . . . in no way depends upon having a direct benefit conferred on the person who obtains the property"), and *Carpenter v. United States*, 484 U.S. 19, 27 (1987) (finding that confidential business information constitutes "property" for purposes of the federal mail fraud statute), do not require such a result. Whatever the outer boundaries may be, the effort to characterize petitioners' actions here as an "obtaining of property from" respondents is well beyond them. Such a result would be an unwarranted expansion of the meaning of that phrase.

Absent contrary direction from Congress, we begin our interpretation of statutory language with the general presumption that a statutory term has its common-law meaning. *See Taylor v. United States*, 495 U.S. 575, 592 (1990); *Morissette v. United States*, 342 U.S. 246, 263 (1952). At common law, extortion was a property offense committed by a public official who took "any money or thing of value" that was not due to him under the pretense that he was entitled to such property by virtue of his office. William Blackstone, *Commentaries on the Laws of England* 141 (1765); R. Anderson, *Wharton's Criminal Law and Procedure* § 1393, pp. 790-791 (1957). In 1946, Congress enacted the Hobbs Act, which explicitly "expanded the common-law definition of extortion to include acts by private individuals." *Evans v. United States*, 504 U.S. 255, 261 (1992). While the Hobbs Act expanded the scope of common-law extortion to include private

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[6]Accordingly, the dissent is mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as *United States v. Tropiano*, 418 F.2d 1069, 1076 (1969), in which the Second Circuit concluded that the intangible right to solicit refuse collection accounts "constituted property within the Hobbs Act definition."

individuals, the statutory language retained the requirement that property must be "obtained." *See* 18 U.S.C. § 1951(b)(2).

Congress used two sources of law as models in formulating the Hobbs Act: the Penal Code of New York and the Field Code, a 19th-century model penal code. *See Evans*, *supra*, at 262.[7] Both the New York statute and the Field Code defined extortion as "the obtaining of property from another with his consent, induced by a wrongful use of force or fear or under color of official right." Report of the Commissioners of the Code, Proposed Penal Code of the State of New York § 613 (1865) (reprint 1998) (Field Code); N.Y. Penal Law § 850 (1909). The Field Code explained that extortion was one of four property crimes, along with robbery, larceny, and embezzlement that included "the criminal acquisition of . . . property." § 584 note, p. 210. New York case law before the enactment of the Hobbs Act demonstrates that this "obtaining of property" requirement included both a deprivation and acquisition of property. *See, e.g.*, *People v. Ryan*, 232 N.Y. 234, 236, 133 N.E. 572, 573 (1921) (explaining that an intent "to extort" requires an accompanying intent to "gain money or property"); *People v. Weinseimer*, 117 App. Div. 603, 616, 102 N.Y.S. 579, 588 (1907) (noting that in an extortion prosecution, the issue that must be decided is whether the accused "received [money] from the complainant").[8]

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[7]Representative Hobbs explicitly stated that the term extortion was "based on the New York law." 89 Cong. Rec. 3227 (1943).

[8]The dissent endorses the opinion of the Court of Appeals in *United States v. Arena*, 180 F.3d 380 (CA2 1999), to reach a more expansive definition of "obtain" than is found in the cases just cited. The Court of Appeals quoted part of a dictionary definition of the word "obtain" in Webster's Third New International Dictionary, 180 F.3d at 394. The full text

(continued...)

We too have recognized that the "obtaining" requirement of extortion under New York law entailed both a deprivation and acquisition of property. *See United States v. Enmons*, 410 U.S. 396, 406, n.16 (1973) (noting that "judicial construction of the New York statute" demonstrated that "extortion requires an intent 'to obtain that which in justice and equity the party is not entitled to receive'") (quoting *People v. Cuddihy*, 151 Misc. 318, 324, 271 N.Y.S. 450, 456 (1934)). Most importantly, we have construed the extortion provision of the Hobbs Act at issue in this case to require not only the deprivation but also the acquisition of property. *See, e.g., Enmons, supra*, at 400. (Extortion under the Hobbs Act requires a "'wrongful' taking of . . . property" (emphasis added)). With this understanding of the Hobbs Act's requirement that a person must "obtain" property from another party to commit extortion, we turn to the facts of these cases.

There is no dispute in these cases that petitioners interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights. Likewise, petitioners' counsel readily acknowledged at oral argument that aspects of his clients' conduct were criminal.[9]

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[8](...continued)
of the definition reads "to gain or attain possession or disposal of." That court then resorted to the dictionary definition of "disposal," which includes "the regulation of the fate . . . of something." Surely if the rule of lenity, which we have held applicable to the Hobbs Act, *see infra*, at 13-14, means anything, it means that the familiar meaning of the word "obtain" -- to gain possession of -- should be preferred to the vague and obscure "to attain regulation of the fate of."

[9]"QUESTION: But are we talking about actions that constitute the commission of some kind of criminal offense in the process?

(continued...)

But even when their acts of interference and disruption achieved their ultimate goal of "shutting down" a clinic that performed abortions, such acts did not constitute extortion because petitioners did not "obtain" respondents' property. Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property. Petitioners neither pursued nor received "something of value from" respondents that they could exercise, transfer, or sell. *United States v. Nardello*, 393 U.S. 286, 290 (1969). To conclude that such actions constituted extortion would effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion.

Eliminating the requirement that property must be obtained to constitute extortion would not only conflict with the express requirement of the Hobbs Act, it would also eliminate the recognized distinction between extortion and the separate crime

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[9](...continued)

. . . . .

"MR. ENGLERT: Oh, yes. Trespass.

"QUESTION: Yes, and other things, destruction of property and so forth, I suppose.

"MR. ENGLERT: Oh, yes . . . .

. . . . .

"QUESTION: I mean, we're not talking about conduct that is lawful here.

"MR. ENGLERT: We are not talking about extortion, but we are talking about some things that could be punished much less severely. It has never been disputed in this case . . . that there were trespasses." Tr. of Oral Arg. 8-9.

of coercion -- a distinction that is implicated in these cases. The crime of coercion, which more accurately describes the nature of petitioners' actions, involves the use of force or threat of force to restrict another's freedom of action. Coercion's origin is statutory, and it was clearly defined in the New York Penal Code as a separate, and lesser offense than extortion when Congress turned to New York law in drafting the Hobbs Act.[10] New York case law applying the coercion statute before the passage of the Hobbs Act involved the prosecution of individuals who, like petitioners, employed threats and acts of force and violence to dictate and restrict the actions and decisions of businesses. *See, e.g., People v. Ginsberg*, 262 N.Y. 556, 188 N.E. 62 (1933) (affirming convictions for coercion where defendant used threatened and actual property damage to compel the owner of a drug store to become a member of a local trade association and to remove price advertisements for specific merchandise from his store's windows); *People v. Scotti*, 266 N.Y. 480, 195 N.E. 162 (1934) (affirming conviction for coercion where defendants used threatened and actual force to compel a manufacturer to enter into an agreement with a labor union of which the defendants were members); *People v. Kaplan*, 240 App. Div. 72, 269 N.Y.S.

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[10]New York Penal Law § 530 (1909), Coercing another person a misdemeanor, provided: "A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully,

"1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property or threatens such violence or injury; or,

"2. Deprives any such person of any tool, implement or clothing or hinders him in the use thereof; or,

"3. Uses or attempts the intimidation of such person by threats or force,

"Is guilty of a misdemeanor."

161 (1934) (affirming convictions for coercion where defendants, members of a labor union, used threatened and actual physical violence to compel other members of the union to drop lawsuits challenging the manner in which defendants were handling the union's finances).

With this distinction between extortion and coercion clearly drawn in New York law prior to 1946, Congress' decision to include extortion as a violation of the Hobbs Act and omit coercion is significant assistance to our interpretation of the breadth of the extortion provision. This assistance is amplified by other evidence of Congress' awareness of the difference between these two distinct crimes. In 1934, Congress formulated the Anti-Racketeering Act, ch. 569, 48 Stat. 979. This Act, which was the predecessor to the Hobbs Act, targeted, as its name suggests, racketeering activities that affected interstate commerce, including both extortion and coercion as defined under New York law.[11] Accordingly, the Act contained both a section explicitly prohibiting coercion and a section prohibiting the offense of extortion as defined by the Field Code and New York Penal Code. See ch. 569, §§ 2(a) and 2(b).

Several years after the enactment of the Anti-Racketeering Act, this Court decided *United States v. Teamsters*, 315 U.S. 521 (1942). In *Teamsters*, this Court construed an exception provided in the Anti-Racketeering Act for the payment of

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[11]A subcommittee of the Commerce Committee, known as the Copeland Subcommittee, employed a working definition of "racketeering," which included organized conspiracies to "commit the crimes of extortion or coercion, or attempts to commit extortion or coercion, within the definition of these crimes found in the penal law of the State of New York and other jurisdictions." S. Rep. No. 1189, 75th Cong., 1st Sess., 3 (1937); *United States v. Culbert*, 435 U.S. 371, 375-376 (1978).

wages by a bona fide employer to a bona fide employee to find that the Act "did not cover the actions of union truckdrivers who exacted money by threats or violence from out-of-town drivers in return for undesired and often unutilized services." *United States v. Culbert*, 435 U.S. 371, 377 (1978) (citing *Teamsters*, *supra*). "Congressional disapproval of this decision was swift," and the Hobbs Act was subsequently enacted to supersede the Anti-Racketeering Act and reverse the result in *Teamsters*. *Enmons*, 410 U.S. at 402, and n.8. The Act prohibited interference with commerce, by "robbery or extortion" but, as explained above, did not mention coercion.

This omission of coercion is particularly significant in light of the fact that after *Teamsters*, a "paramount congressional concern" in drafting the Hobbs Act, "was to be clear about what conduct was prohibited." *Culbert*, *supra*, at 378.[12] Accordingly, the Act "carefully defines its key terms, such as 'robbery,' 'extortion,' and 'commerce.'" *Id.*, at 373. Thus, while coercion and extortion certainly overlap to the extent that extortion necessarily involves the use of coercive conduct to obtain property, there has been and continues to be a recognized difference between these two crimes, *see*, *e.g.*, ALI, Model Penal Code and Commentaries §§ 212.5, 223.4 (1980) (hereinafter Model Penal Code),[13] and we find it evident that

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[12]As we reported in *Culbert*, *supra*, at 378: "Indeed, many Congressmen praised the [Hobbs Act] because it set out with more precision the conduct that was being made criminal. As Representative Hobbs noted, the words robbery and extortion 'have been construed a thousand times by the courts. Everybody knows what they mean'" (quoting 91 Cong. Rec. 11912 (1945)).

[13]Under the Model Penal Code § 223.4, Comment 1, pp. 201-202, extortion requires that one "obtains [the] property of another" using threat as "the method employed to deprive the victim of his property." This (continued...)

this distinction was not lost on Congress in formulating the Hobbs Act.

We have said that the words of the Hobbs Act "do not lend themselves to restrictive interpretation" because they "'manifest . . . a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence.'" *Culbert*, *supra*, at 373 (quoting *Stirone v. United States*, 361 U.S. 212, 215 (1960)). We have also said, construing the Hobbs Act in *Enmons*, *supra*, at 411:

> "Even if the language and history of the Act were less clear than we have found them to be, the Act could not properly be expanded as the Government suggests -- for two related reasons. First, this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity (citations omitted)."

We think that these two seemingly antithetical statements can be reconciled. *Culbert* refused to adopt the view that Congress had not exercised the full extent of its commerce power in prohibiting extortion which "affects commerce or the movement of any article or commodity in commerce." But there is no contention by petitioners here that their acts did not affect interstate commerce. Their argument is that their acts did not amount to the crime of extortion as set forth in the Act, so

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[13](...continued)
"obtaining" is further explained as "' bringing about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another.'" *Id.*, § 223.3, Comment 2, at 182. Coercion, on the other hand, is defined as making "specified categories of threats . . . with the purpose of unlawfully restricting another's freedom of action to his detriment." *Id.*, § 212.5, Comment 2, at 264.

the rule of lenity referred to in *Enmons* may apply to their case quite consistently with the statement in *Culbert*. "When there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-360 (1987). If the distinction between extortion and coercion, which we find controls these cases, is to be abandoned, such a significant expansion of the law's coverage must come from Congress, and not from the courts.

Because we find that petitioners did not obtain or attempt to obtain property from respondents, we conclude that there was no basis upon which to find that they committed extortion under the Hobbs Act.

The jury also found that petitioners had committed extortion under various state-law extortion statutes, a separate RICO predicate offense. Petitioners challenged the jury instructions as to these on appeal, but the Court of Appeals held that any error was harmless, because the Hobbs Act verdicts were sufficient to support the relief awarded. Respondents argue in this Court that state extortion offenses do not have to be identical to Hobbs Act extortion to be predicate offenses supporting a RICO violation. They concede, however, that for a state offense to be an "act or threat involving . . . extortion, . . . which is chargeable under State law," as RICO requires, *see* 18 U.S.C. § 1961(1), the conduct must be capable of being generically classified as extortionate. Brief for Respondents 33-34. They further agree that such "generic" extortion is defined as "'obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats.'" *Id.* at 34 (quoting *Nardello*, 393 U.S. at 290).

This concession is in accord with our decisions in *Nardello*

and *Taylor v. United States*, 495 U.S. 575 (1990). In *Nardello*, we held that the Travel Act's prohibition, 18 U.S.C. § 1952(b)(2), against "extortion . . . in violation of the laws of the State in which committed or of the United States" applies to extortionate conduct classified by a state penal code as blackmail rather than extortion. We determined that if an act prohibited under state law fell within a generic definition of extortion, for which we relied on the Model Penal Code's definition of "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats," it would constitute a violation of the Travel Act's prohibition regardless of the State's label for that unlawful act. *See Nardello*, *supra*, at 296 (explaining that regardless of Pennsylvania's labeling defendants' acts as blackmail and not extortion, defendants violated the Travel Act because "the indictment encompasses a type of activity generally known as extortionate since money was to be obtained from the victim by virtue of fear and threats of exposure"). In *Taylor*, relying in part on *Nardello*, we concluded that in including "burglary" as a violent crime in 18 U.S.C. § 924(e)'s sentencing enhancement provision for felons' possessing firearms, Congress meant "burglary" in "the generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598. Accordingly, where as here the Model Penal Code and a majority of States recognize the crime of extortion as requiring a party to obtain or to seek to obtain property, as the Hobbs Act requires, the state extortion offense for purposes of RICO must have a similar requirement.

Because petitioners did not obtain or attempt to obtain respondents' property, both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed. The 23 violations of the Travel Act and 23

acts of attempting to violate the Travel Act also fail. These acts were committed in furtherance of allegedly extortionate conduct. But we have already determined that petitioners did not commit or attempt to commit extortion.

Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated. We therefore need not address the second question presented -- whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964.

The judgment of the Court of Appeals is accordingly Reversed.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring.

I join the Court's opinion, persuaded that the Seventh Circuit's decision accords undue breadth to the Racketeer Influenced and Corrupt Organizations Act (RICO or Act). As JUSTICE STEVENS recognizes, "Congress has enacted specific legislation responsive to the concerns that gave rise to these cases." Post, at 6 (dissenting opinion). In the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248, Congress crafted a statutory response that homes in on the problem of criminal activity at health care facilities. *See ante* at 9-10, and n. 9 (noting petitioners' acknowledgment that at least some of the protesters' conduct was criminal, and observing that "the crime of coercion [a separate, and lesser offense than extortion] more accurately describes the nature of petitioners' actions"). Thus, the principal effect of a decision against

petitioners here would have been on other cases pursued under RICO.*

RICO, which empowers both prosecutors and private enforcers, imposes severe criminal penalties and hefty civil liability on those engaged in conduct within the Act's compass. *See, e.g.*, § 1963(a) (up to 20 years' imprisonment and wide-ranging forfeiture for a single criminal violation); § 1964(a) (broad civil injunctive relief); § 1964(c) (treble damages and attorneys' fees for private plaintiffs). It has already "evolved into something quite different from the original conception of its enactors," *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985), warranting "concerns over the consequences of an unbridled reading of the statute," *id.*, at 481. The Court is rightly reluctant, as I see it, to extend RICO's domain further by endorsing the expansive definition of "extortion" adopted by the Seventh Circuit.

JUSTICE STEVENS, dissenting.

The term "extortion" as defined in the Hobbs Act refers to "the obtaining of property from another." 18 U.S.C. § 1951(b)(2). The Court's murky opinion seems to hold that this phrase covers nothing more than the acquisition of tangible property. No other federal court has ever construed this statute so narrowly.

For decades federal judges have uniformly given the term "property" an expansive construction that encompasses the

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*At oral argument, the Government was asked: "Do you agree that your interpretation would have been applicable to the civil rights sit-ins?" Tr. of Oral Arg. 25. The Solicitor General responded: "Under some circumstances, it could have if illegal force or threats were used to prevent a business from operating." Ibid.

intangible right to exercise exclusive control over the lawful use of business assets. The right to serve customers or to solicit new business is thus a protected property right. The use of violence or threats of violence to persuade the owner of a business to surrender control of such an intangible right is an appropriation of control embraced by the term "obtaining." That is the commonsense reading of the statute that other federal judges have consistently and wisely embraced in numerous cases that the Court does not discuss or even cite. Recognizing this settled definition of property, as I believe one must, the conclusion that petitioners obtained this property from respondents is amply supported by the evidence in the record.

Because this construction of the Hobbs Act has been so uniform, I only discuss a few of the more significant cases. For example, in *United States v. Tropiano*, 418 F.2d 1069 (1969), the Second Circuit held that threats of physical violence to persuade the owners of a competing trash removal company to refrain from soliciting customers in certain areas violated the Hobbs Act. The court's reasoning is directly applicable to these cases:

> "The application of the Hobbs Act to the present facts of this case has been seriously challenged by the appellants upon the ground that the Government's evidence indicates that no 'property' was extorted and that there was no interference or attempted interference with interstate commerce. They assert that nothing more than 'the right to do business' in the Milford area was surrendered by Caron and that such a right was not 'property' 'obtained' by the appellants, as those terms are used in the Act. While they concede that rubbish removal accounts which are purchased

and sold are probably property, they argue that the right to solicit business is amorphous and cannot be squared with the Congressional expression in the Act of 'obtaining property.' The Hobbs Act 'speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence.' *Stirone v. United States*, 361 U.S. 212, 215 (1960). The concept of property under the Hobbs Act, as devolved from its legislative history and numerous decisions, is not limited to physical or tangible property or things (*United States v. Provenzano*, 334 F.2d 678 (3d Cir. 1964); *United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958)), but includes, in a broad sense, any valuable right considered as a source or element of wealth (*Bianchi v. United States*, 219 F.2d 182 (8th Cir. 1955)), and does not depend upon a direct benefit being conferred on the person who obtains the property (*United States v. Green*, 350 U.S. 415 (1956)).

"Obviously, Caron had a right to solicit business from anyone in any area without any territorial restrictions by the appellants and only by the exercise of such a right could Caron obtain customers whose accounts were admittedly valuable .... The right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution (*Louis K. Ligget Co. v. Baldridge*, 278 U.S. 105 (1928); *cf.*, *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465 (1921) .... Caron's right to solicit accounts in Milford, Connecticut constituted property within the Hobbs Act definition." (some citations omitted).

The *Tropiano* case's discussion of obtaining property has been cited with approval by federal courts in virtually every circuit in the country. *See, e.g., United States v. Hathaway*, 534 F.2d 386, 396 (CA1 1976); *United States v. Arena*, 180 F.3d 380, 392 (CA2 1999); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (CA3 1989); *United States v. Santoni*, 585 F.2d 667, 673 (CA4 1978); *United States v. Nadaline*, 471 F.2d 340, 344 (CA5 1973); *United States v. Debs*, 949 F.2d 199, 201 (CA6 1991); *United States v. Lewis*, 797 F.2d 358, 364 (CA7 1986); *United States v. Zemek*, 634 F.2d 1159, 1174 (CA9 1980).[1] Its interpretation of the term

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[1]Indeed, the Ninth Circuit's discussion of the nature of property under the Hobbs Act illustrates just how settled this issue was in the Courts of Appeals:

> "The concept of property under the Hobbs Act has not been limited to physical or tangible 'things.' The right to make business decisions and to solicit business free from wrongful coercion is a protected property right. *See, e.g., United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978) (right to make business decisions free from outside pressure wrongfully imposed); *United States v. Nadaline*, 471 F.2d 340 (5th Cir.) (right to business accounts and unrealized profits) . . . . *Cf. United States v. Hathaway*, 534 F.2d 386, 395 (1st Cir.) (rejection of narrow perception of 'property'); *Battaglia v. United States*, 383 F.2d 303 (9th Cir. 1967) (right to lease space in bowling alley free from threats) . . . . Chase's right to solicit business free from threatened destruction and physical harm falls within the scope of protected property rights under the Hobbs Act.
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> . . . . .
>
> "Evidence of the previously described acts of intimidation and violence suffices. Appellants' objective was to induce Chase to give up a lucrative business. The fact that their threats were unsuccessful does not preclude conviction." *United States v. Zemek*, 634 F.2d at 1174 (some citations omitted).

(continued...)

"property" is consistent with pre-Hobbs Act decisions of this Court, *see Buchanan v. Warley*, 245 U.S. 60, 74 (1917) (property "consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution"), the New York Court of Appeals, *see People v. Barondess*, 133 N.Y. 649, 31 N.E. 240 (1892), the California Supreme Court, *People v. Cadman*, 57 Cal. 562 (1881), and with our recent decision in *Carpenter v. United States*, 484 U.S. 19 (1987).

The courts that have considered the applicability of the Hobbs Act to attempts to disrupt the operations of abortion clinics have uniformly adhered to the holdings of cases like *Tropiano*. *See, e.g., Libertad v. Welch*, 53 F.3d 428, 438, n. 6 (CA1 1995); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d at 1350); *United States v. Anderson*, 716 F.2d 446, 447-450 (CA7 1983). Judge Kearse's endorsement of the Government's position in *United States v. Arena*, 180 F.3d 380 (CA2 1999), followed this consistent line of cases. The jury had found that the defendants had engaged in "an overall strategy to cause abortion providers, particularly Planned Parenthood and Yoffa, to give up their property rights to engage in the business of providing abortion services for fear of future attacks." *Id.* at 393. Judge Kearse described how this behavior fell well within the reach of the Hobbs Act:

> "[P]roperty may be tangible or intangible, and the property at issue here was the intangible right to conduct business free

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[1](...continued)
None of the cases following *United States v. Tropiano*, 418 F.2d 1069 (CA2 1969), even considered the novel suggestion that this method of obtaining control of intangible property amounted to nothing more than the nonfederal misdemeanor of "coercion," *see ante*, at 9-10 (majority opinion); *ante*, at 1 (GINSBURG, J. concurring).

from threats of violence and physical harm . . . . A perpetrator plainly may 'obtain' property without receiving anything, for obtaining includes 'attaining . . . disposal of,' *Webster's Third New International Dictionary* 1559 (1976); and 'disposal' includes 'the regulation of the fate . . . of something,' *id.* at 655. Thus, even when an extortionist has not taken possession of the property that the victim has relinquished, she has nonetheless 'obtained' that property if she has used violence to force her victim to abandon it. The fact that the target of a threat or attack may have refused to relinquish his property does not lessen the extortionist's liability under the Hobbs Act, for the Act, by its terms, also reaches attempts. *See* 18 U.S.C. § 1951(a); *McLaughlin v. Anderson*, 962 F.2d 187, 194 (2d Cir. 1992).

"In sum, where the property in question is the victim's right to conduct a business free from threats of violence and physical harm, a person who has committed or threatened violence or physical harm in order to induce abandonment of that right has obtained, or attempted to obtain, property within the meaning of the Hobbs Act." *Id.* at 394.

In my opinion Judge Kearse's analysis of the issue is manifestly correct. Even if the issue were close, however, three additional considerations provide strong support for her conclusion. First, the uniform construction of the statute that has prevailed throughout the country for decades should remain the law unless and until Congress decides to amend the statute. *See Reves v. Ernst & Young*, 494 U.S. 56, 74 (1990) (STEVENS, J., concurring); *Chesapeake & Ohio R. Co. v. Schwalb*, 493 U.S. 40, 51 (1989) (STEVENS, J., concurring in judgment); *McNally v. United States*, 483 U.S. 350, 376-377

(1987) (STEVENS, J., dissenting);[2] *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 268-269 (1987) (STEVENS, J., concurring in part and dissenting in part). Second, both this Court and all other federal courts have consistently identified the Hobbs Act as a statute that Congress intended to be given a broad construction. *See, e.g., Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Staszcuk*, 517 F.2d 53 (CA7 1975). Third, given the fact that Congress has enacted specific legislation responsive to the concerns that gave rise to these cases,[3] the principal beneficiaries of the Court's dramatic retreat from the position that federal prosecutors and federal courts have maintained throughout the history of this important statute will certainly be the class of professional criminals whose conduct persuaded Congress that the public needed federal protection from extortion.[4]

I respectfully dissent.

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[2]Congress corrected the Court's narrow reading of the mail fraud statute in *McNally* by passing 18 U.S.C. § 1346, which overruled *McNally*. *See, e.g., United States v. Bortnovsky*, 879 F.2d 30, 39 (CA2 1989) ("Section 1346 . . . overrules *McNally*") Of course, Congress remains free to correct the Court's error in these cases as well.

[3]*See* Freedom of Access to Clinic Entrances Act of 1994, 108 Stat. 694.

[4]The concern expressed by JUSTICE GINSBURG, *ante*, at 1, is misguided because an affirmance in these cases would not expand the coverage of the Racketeer Influenced and Corrupt Organizations Act but would preserve the Federal Government's ability to bring criminal prosecutions for violent conduct that was, until today, prohibited by the Hobbs Act.

APPENDIX D

No. 86 C 7888

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC., and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly-situated clinics, Plaintiff, v. JOSEPH M. SCHEIDLER; ANDREW SCHOLBERG; TIMOTHY MURPHY; PRO-LIFE ACTION LEAGUE, INC.; and OPERATION RESCUE, Defendant.

July 16, 1999, Decided
July 28, 1999, Docketed

MEMORANDUM OPINION AND ORDER

Before this court are various post-trial motions filed by both the defendants Joseph Scheidler and Operation Rescue ("defendants") and the two plaintiff classes represented by the National Organization for Women ("NOW") and two reproductive health clinics, Delaware Women's Health Organization, Inc. ("DWHO") and Summit Women's Health Organization ("Summit") (together, as "plaintiffs"). Defendant

filed a motion to decertify the class of NOW members and non-members as well as decertify the class of clinics. The plaintiffs filed a motion to amend the complaint to conform to the evidence as well as a motion for Phase II damage trials. Plaintiffs also filed a petition for injunctive relief. Defendants' motion for decertification of the two classes is DENIED. Plaintiffs' motion to amend the complaint to conform to evidence is DENIED. Plaintiffs' motion for Phase II damage trials is DENIED. The court GRANTS the plaintiffs' petition for a permanent injunction against defendants for a period of twelve years. All other motions are denied as moot.

Background

After thirteen years, this long and controversial case is entering one of its final stages. This case consists of a plaintiff class of reproductive health clinics and a class of potential women patients who brought claims arising under § 1962 of the Racketeer Influenced and Corrupt Organizations Act ("civil RICO") against the defendants, a group of anti-abortion protestors. After a lengthy trial that occurred from March 4, 1998 through April 14, 1998, the jury returned a verdict for the plaintiffs on these civil RICO claims. While the procedural history of this case is recounted in detail in previous opinions,[1] the evidence presented at trial must be reviewed in order to understand the post-trial motions before this court.

At the trial, evidence spanning a period of twelve years of

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[1]*See generally NOW v. Scheidler*, 510 U.S. 249 (1994); *NOW v. Scheidler*, 968 F.2d 612 (7th cir. 1992), *cert. granted*, 508 U.S. 971 (1993); *NOW v. Scheidler*, 1997 WL 610782 (N.D.Ill. 1997); *NOW v. Scheidler*, 897 F. Supp. 1047 (N.D.Ill. 1995); *NOW v. Scheidler*, 1995 WL 592228 (N.D. Ill. 1995).

various incidents at reproductive health clinics was presented. This evidence included incidents across the entire United States: Chicago, Illinois; Wichita, Kansas; Cherry Hill, New Jersey; New York, New York; Farmington, Michigan; Jackson, Mississippi; Dobbs Ferry, New York; Fargo, North Dakota; Wilmington, Delaware; Atlanta, Georgia; San Antonio, Texas, to name a few. Several of these events were videotaped and showed defendant protestors chaining themselves to clinic doors and surrounding patients to block their path to the clinic entrances. Over the weeks of the trial, witnesses testified to the various acts of the defendants and others. A select few are described below:

- In Washington, D.C., busloads of protestors rushed the doors of a clinic, pressing the bodies of clinic staff members and volunteers against the clinic entrance as they screamed they were being crushed. As one witness testified, "several of us started yelling as loud as we could, 'please stop pushing. We're going to get hurt." (Transcripts, p. 1008).

- In Milwaukee, Wisconsin, protestors repeatedly banged on the car of a patient as she entered a health clinic parking lot, and grabbed at her arms and legs as she attempted to enter the clinic. "They surrounded me and my car. Telling me I wasn't a Christian, a baby killer. That I'm going to go to hell for this. Shoving pamphlets in my hand. Trying to stop me from making my way to the door of the building." (Transcripts, p. 1916). The patient was visiting the clinic to receive her pap smear results and to receive her contraceptive medication.

- In Wilmington, Delaware, protestors forcibly entered a clinic and wreaked havoc. These protesters destroyed medical

equipment, entered operating rooms where clinic staff and patients were engaged in appointments, tore down cabinets, destroyed medication and medical equipment, and chained themselves to medical and operating room tables. (Transcripts, p. 663).

- In Chico, California, a clinic administrator and two clinic escorts were physically smashed up against the entrance doors of a clinic by hundreds of protestors for four and a half hours. When the clinic administrator told the protestors that she was scared and was being crushed, she heard protestors shout, "Don't pay any attention to them. They're murderers. They're baby killers. Whatever happens to them is God's will." (Transcripts, p. 1445). The glass entrance to the clinic was shattered and the clinic administrator received bruises on her legs and arms from the event.

- In Los Angeles, California, a patient who was visiting a health clinic was assaulted by protestors. The patient had an appointment at the clinic for follow-up after a surgery to repair and restore her reproductive organs. However, she was confronted by the defendant protestors before she could enter the clinic:

> "All of a sudden, a crowd of people came running from both sides of the building towards the parking lot, towards us. . . They were shouting 'murderer, baby murderer.' . . somebody grabbed me by the back of my hair, and I fell up against the car. Then I just saw all of these people, and they were grabbing their arms and grabbing at me. I didn't know what was happening, and I was yelling for [my friend] to help me. Then [my friend] was pushing the people away, and they

were fighting. . . I remember rolling down the side of the car, and the people were hitting me. Then I remember looking up to call out to ask God to help me. As I looked up and yelled 'oh, God help me,' a man hit me in the head with a big old sign. It was at this point that I grabbed [my friend's] arm and [he] grabbed me, and I put my arms around [his] waist. Then [he] was pushing the people away, and they were still grabbing and pulling at me. Then I felt myself going down, and I got scared, real scared. It was just so many people, and they were fighting and grabbing at me, and they were yelling thing like 'murderer.' I wondered, who did I kill? Who did I hurt?" (Transcripts, p. 1519).

The patient lost consciousness as she began to bleed from her abdomen for protestors had caused her surgical incision to be torn open. Protestors rocked and beat her car as clinic personnel rushed the patient to the trauma unit of a nearby hospital. (Transcripts, pp. 1520-1522).

These are just a few examples of the incidents presented to the jury throughout this trial. Repeatedly, witnesses testified to the fear and intimidation they felt from the actions of protestors.

One clinic volunteer testified, "They were . . . shoving and elbowing and smashing. I mean, they were right within less than an inch of us. . . You know, you start sweating. You're scared. Your heart's pounding." (Transcripts, p. 1444). A patient recounted, "I was hysterical. I was afraid. I thought they were going to kill me." (Transcript, p. 1522). A clinic administrator reflected, "I was concerned about the injury to our staff and to our patients, not only the physical injury of the building itself and the equipment but also the emotional injury

and distress to our patients and to our staff, who were terrified . . ." (Transcripts, p. 663).

These incidents were connected to the organizational efforts of the Pro-Life Action Network (PLAN) and Operation Rescue (OR) and the leadership of these organizations through Joseph Scheidler and other named defendants. PLAN was founded in 1984 to bring anti-abortion activists together to coordinate their activities across the United States. Scheidler and the founding members of PLAN believed that the lobbying and legislative efforts of other anti-abortion organizations, such as the National Right to Life, were not effective. (Transcripts, p. 3936). PLAN founding members believed in more "aggressive tactics," such as blocking clinic doors with their bodies and other objects in order to stop clinic patients and staff from entering the clinic, a tactic called "rescues." (Transcripts, pp. 3936-37). Scheidler, John Ryan, and Andrew Scholberg laid the initial groundwork for PLAN.

The first meeting of PLAN occurred in Ft. Lauderdale, Florida in 1984. Over 600 activists attended, with Scheidler acting as the chair of the meeting. (Transcripts, pp. 3974, 4124). At that meeting, the "Leadership Council" was created with a geographic distribution to cover the entire United States. (Transcripts, p. 3990). PLAN began its initial fund-raising efforts, promoting itself as an organization with over 2000 members with a network of regional directors to coordinate "rescue" activities. (Transcripts, pp. 3977-79). Eventually, PLAN created paid positions for a Director and an Associate Director, as well as paid for the travel expenses of the Leadership Council to various "rescues," or protests, across the country. (Transcripts, pp. 4098-99, 4255).

In 1987, at a PLAN Leadership Council meeting in Washington, D.C., Operation Rescue ("OR") was born.

(Transcripts, p. 4085). The stated purpose of OR was to be "to overwhelm the law enforcement system and gain free access to the clinics without legal consequences." (Transcripts, p. 4091). The PLAN Leadership Council gave approval for the formation of OR, and to Randall Terry as its director, and agreed to OR's first field training, in Cherry Hill, New Jersey. (Transcripts, p. 4088). PLAN and OR began to act as joint organizations, where Randall Terry sat on the board of PLAN, Scheidler sat on the board of OR, and the two organizations began joint fund-raising efforts. (Transcripts, pp. 4087, 4226, 4253).

The stated purpose of both PLAN and OR was "to put clinics out of business." (Transcripts, pp. 4149). In particular, these two groups were to work "behind the scenes" of the anti-abortion movement and use aggressive tactics, such as "rescues" and massive demonstrations. (Transcripts, pp. 4091, 4124). PLAN and OR achieved these goal in various ways. To communicate to PLAN members, Scheidler had a daily "hotline" for members to call, where times and locations of protests were announced. (Transcripts, pp. 3949, 4128). PLAN also issued a regular newsletter, promoting future protest events as well as reporting the results of various organized PLAN activities. (*Id.*). Scheidler himself also gave "advice" to PLAN members through the hotline and newsletters, as well as through PLAN speaking events. For example, Scheidler instructed PLAN members to "case out" clinics to learn their layout and make clinic staff know that they were "vulnerable." (Transcripts, p. 3930). Scheidler also advised members, when at protests, to not obey orders of clinic personnel. When he visited local PLAN groups, Scheidler insisted that at least some of the members enter the clinic facility when they were engaged in a protest. (Transcripts, p. 3932). Through the use of PLAN newsletters, speaking events, and conventions, PLAN

leadership supported illegal tactics, such as physically entering clinics and blocking procedure rooms. (Transcripts, p. 3941). In fact, Scheidler took pride in the fact that PLAN created the "lock and block," where protestors physically lock their bodies to the doors of clinics or other large objects in front of clinic doors. (Transcripts, p. 4124).

The most significant organizing tool for defendants was the annual PLAN convention, was held in different cities across the country. Evidence was presented about the PLAN convention, and the resulting activities, for each year from 1985 until 1997. Only a select number of these conventions will be highlighted here.[2] For example, in 1985, at the PLAN convention in Appleton, Wisconsin, PLAN members agreed to create "a year of pain and fear in the abortion industry." (Transcripts, p. 4006). One step towards that goal was a planned "Christmas Truce," where PLAN members were to return to their home communities and write the reproductive health clinics in their area to inform them that during month of December they would have to "close or be closed" by protesters blocking their doors. (Transcripts, p. 4007). In Chicago, PLAN sent these letters to every single reproductive health clinic that provided abortions in the area. (*Id.*).

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[2]Each year the PLAN conference occurred, PLAN organized protests closed the clinics in that area. In Chicago in 1988, PLAN conducted workshop trainings on "lock and block" that were used in Chicago that year. (Transcripts, p. 4100). In Jackson, Mississippi in 1990, three clinics were closed by protestors during the PLAN conference. (Transcripts, pp. 4114-19, 4255). In San Antonio, Texas in 1992, clinics in the area were closed daily by protestors while the PLAN convention occurred. (Transcripts, pp. 4130-31). All of these protests were reported on Scheidler's Hotline and in the PLAN newsletter, praising the involvement of PLAN members, after they occurred. (Transcripts, pp. 4101, 4255, 4131).

In 1989, at the PLAN conference in Livonia, Michigan, PLAN members organized clinic protests to occur in Farmington, Michigan during the conference. (Transcripts, p. 4108). Several hundred protestors closed the clinic in Farmington and the "success" of the protests was reported in the PLAN newsletter. (Transcripts, pp. 4109-12). In 1991, clinic protests occurred for weeks in Wichita, Kansas shortly after the PLAN convention held there. (Transcripts, p. 4122). PLAN leadership were significantly involved in the planning and execution of these protests. (Transcripts, pp. 4258-59).

PLAN created a successful design for the organizing of these protests. First, the protest would be announced on Scheidler's Hotline and communicated through PLAN members. PLAN leadership usually visit the site of the protest before it occurred. After the protest and clinic closing occurred, the results would be reported in the PLAN newsletter. For example, in Wilmington, Delaware in April of 1986, Scheidler entered, without permission, a reproductive health clinic with three other PLAN members and stated he was "casing the place." Even though he was asked to leave, he roamed throughout the clinic. (Transcripts, pp. 4036-39). The next day, a protest occurred and PLAN members entered the clinic and caused considerable property damage by destroying equipment. (Transcripts, p. 633). PLAN reported this protest in its newsletter and other public relations materials and described it as a "fun time." (Transcripts, p. 4039). This same pattern occurred in Pensacola, Florida in March of that same year. (Transcripts, p. 3914). Members of the PLAN Leadership Council met in Pensacola and discussed how an "invasion" of this particular clinic could be orchestrated. It was agreed that some members would enter the waiting room of the clinic and others would enter the clinic through the back door.

(Transcripts, p. 4012). The next day, the clinic was invaded by protesters, who "trashed the place," causing serious damage to surgical equipment and other medical supplies. The protesters were arrested. (Transcripts, pp. 4013-25). PLAN continued to use this same pattern of organizing, communication, and protest to close clinics throughout the country, as seen in New York City in 1988; Chicago in 1984, 1989, and 1996; Houston, Texas in 1990; and Dobbs Ferry, New York in 1991. (Transcripts, pp. 3996, 4095, 4113-14, 4119, 4190, 4256). The jury heard evidence tending to show that the objectives of the defendants at various protests included peaceful protest, informational picketing and leafleting, and acts of passive resistance in combination with intimidation (including violence and threats of violence) to stop abortions.

After reviewing the evidence, the jury returned a verdict for the plaintiffs on their civil RICO claims. In particular, the jury found 21 acts or threats involving extortion against patients, prospective patients, doctors, nurses, and/or clinic employees in violation of federal law, 25 in violation of state law, and four acts or threats of physical violence to persons or property. Defendants were found liable for $54,471.28 in monetary damages to Summit Women's Health Organization and for $31,455.64 in monetary damages to Delaware Women's Health Organization.

Since the trial was completed, both defendants and plaintiffs have filed various motions as steps towards bringing this case to its conclusion. In order to expedite this process, this court held a hearing on the issue of injunctive relief in July of 1998. This court now addresses all remaining motions in this case.

Analysis

I. Decertification of the Classes

A. Decertification of NOW

Defendants argue that NOW should be decertified as the class representative for NOW members and non-NOW members because NOW lacks standing as an association. Citing *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), the Defendants argue that the testimony of four anonymous female witnesses at trial showed that individual participation of NOW members and non-NOW members was required to prove their claim, thus violating the third criteria for associational standing. (Dft's Corrected Motion for Decert., pp. 5, 12-13).

This court in a previous decision in this case found that NOW had associational standing under the Hunt test. *NOW v. Scheidler*, 897 F. Supp. 1047, 1068-69 (N.D.Ill. 1995), citing *Hunt*, 432 U.S. at 343. In particular, the court found that NOW met the third criteria of the *Hunt* test, i.e. that the claim and the relief do not require individual participation in the lawsuit, for NOW was only suing for injunctive relief, an appropriate form of relief for an association to seek. *NOW v. Scheidler*, 897 F. Supp. 1047, 1068-69 (N.D. Ill. 1995), citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975). The court stated in that opinion:

> "It may be necessary for at least some of NOW's membership to testify as to their impediments in receiving treatment at abortion clinics; however, the limited nature of this proof will not force NOW to violate Hunt's third prong."

897 F. Supp. at 1070.

The resulting testimony of the four anonymous witnesses at trial did not violate the third prong of *Hunt* test and therefore NOW maintains standing.

B. Decertification of the Clinic Class: Summit and the Wisconsin litigation

Defendants argue that Summit, one of the representatives of the Clinic Class, is precluded from bringing the claims on behalf of the class because of a dismissal with prejudice of claims brought on similar facts in Wisconsin state court. (Dft's Motion for Decert., p.3; Dft's Corrected Memo in Support of Decert., p.4 fn.8). Therefore, the Defendants argue, under Wisconsin law and the full faith and credit clause, 28 U.S.C. § 1738, Summit is subject to claim preclusion.[3]

On August 25, 1997, Summit (under the auspices of the National Women's Health Organization of Summit, Inc.), along with the Milwaukee Women's Medical Services and Planned Parenthood of Wisconsin, filed state claims alleging invasion of privacy, assault, and public and private nuisance by Joseph Scheidler, PLAN, and other defendants in the present case, and

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[3]The Defendants argue that DWHO is also precluded because DWHO is in privity with Summit. However, there is no mention of DWHO, a Delaware-based clinic, anywhere in the papers of the Wisconsin case, nor have the Defendants present any evidence connecting DWHO to Summit. Therefore, the court will only consider the Defendants' claim preclusion arguments as they apply to Summit. After the trial was over and the instant motions were briefed, the Scheidler defendants sought to reopen the record, presumably to attempt to demonstrate "privity." That request was denied as untimely.

demanded temporary and permanent injunctive relief, as well as compensatory and punitive damages. (Dft's App. to Post-Trial Motions, Vol. I, Ex. A). On September 22, 1997, an Amended Complaint was filed that did not include Summit as a plaintiff nor Joseph Scheidler nor PLAN as defendants. (Dft's App. to Post-Trial Motions, Vol. I, Ex. L). Counsel for Summit and Scheidler signed a stipulation and order for dismissal on December 1, 1997, that stated that the claims were dismissed with prejudice and a final order for dismissal was signed by Wisconsin Circuit Court Judge Charles Kahn. (Dft's App. to Post-Trial Motions, Vol. I, Ex. R). However, on February 24, 1998, just three days before the present case was to go to trial, Summit presented a motion to the Wisconsin Circuit Court to reopen and modify the stipulation and order for dismissal. (Dft's Appl to Post-Trial Motions, Vol. I., Ex. T). In response to the motion and a hearing on the matter, on February 26, 1998, Judge Kahn signed an order for dismissal that dismissed Summit's claims against Scheidler with prejudice, but with the stipulation that, "it is not the intent of this court that this order have any effect upon *National Organization for Women, Inc., et al. v. Joseph M. Scheidler, et al.*, Case No. 86 C 7888 in the United States District Court for the Northern District of Illinois, Eastern District." (Dft's Appl. to Post-Trial Motions, Vol. I., Ex. BB). On May 4, 1999, the Wisconsin Appellate Court reversed Judge Kahn's order and the cause has been remanded. *Milwaukee Women's Medical Service, Inc. v. Joseph Scheidler et al.*, No. 98-1139-FT, May 4, 1999 (Dft's Motion for Leave to Add to the Record, Attachment A).

Res judicata is an affirmative defense that must be raised or lost and the burden of establishing preclusion is upon the party claiming it. Fed. R. Civ. P. 8(c); Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §§ 4404, 4405.

Counsel for Scheidler did not properly raise the defense prior to trial. The original dismissal in the Wisconsin case was filed December 1, 1997. However, in the over 500 pages Defendants filed in February, 1998 with the Final Pretrial Order, the Wisconsin litigation was never mentioned. Counsel for Scheidler did not inform the court of the Wisconsin litigation and its dismissal until February 19, 1998, in Defendant's Motion for Continuance of All or Part of the Final Pretrial Conference or Trial. (Dft's Mot. for Cont., p. 14). In that motion, counsel for Defendant only states that claims filed by Summit against Scheidler in Wisconsin Circuit Court were dismissed with prejudice. (*Id.*). However, the counsel for Defendant never informed or even stated to this court what the Wisconsin state claims were. At the Final Pretrial Conference, Counsel for Defendant mentioned the litigation in Wisconsin again, but only as a support for his argument for continuance of the Final Pretrial Conference and not as an argument for res judicata. (Final Pretrial Conference Transcripts, February 20, 1998, pp. 10-12). When asked repeatedly and directly by the court what the Wisconsin litigation had to do with the present case, Counsel did not answer the question. (Final Pretrial Conference Transcripts, February 20, 1998, pp. 9-16). The court clearly stated to counsel that if he was requesting an order, he should submit it to the court in writing.[4] Neither

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[4]After continuous questioning of counsel, the court stated, "Mr. Brejcha, I have urged you since my involvement in this case not to mention matters to this court. That if you have something that you think is sufficiently important that affects the proceedings in this court, to put it in writing. The Federal Rules of Civil Procedure make it quite clear that a request for an order must be in writing except if the request is made during a hearing. So mentioning things in passing in court is of no particular moment." (Final

(continued...)

before nor during trial did Counsel ever submit to this court any coherent statement of the position now asserted nor proffer any orders from the Wisconsin Circuit Court stating that there was a final judgment in that case. Therefore, the defendants did not timely raise the affirmative defense of res judicata and the defense is now lost.

Even if Counsel for Defendant had timely raised the res judicata defense before trial, Summit would not have been precluded from litigating these claims in federal court, for Judge Kahn of the Wisconsin Circuit Court ordered in his stipulation that the order for dismissal was not intended to affect the present case. (Dft's App. to Post-Trial Motions, Vol. I., Ex. BB). The most this court would have done is stayed the proceedings until the appeal of the Wisconsin state court judgment had been decided.[5] *Rogers v. Desiderio*, 58 F.3d 299, 302 (7th Cir. 1995) (finding that when a state court decision that could have claim preclusive effects on a federal case is appealed, the federal court should stay proceedings until the state case has reached a conclusion). When a state court has reached a final judgment that would have claim preclusive effects over pending federal litigation, the federal court must respect that judgment. *Majeske v. Fraternal Order of Police, Local Lodge No. 7*, 94 F.3d 307, 312 (7th Cir. 1996). The Full Faith and Credit Act provides in part that the "judicial proceedings" of any state "shall have the same full faith and credit in every court within the United States and its Territories

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[4](...continued)
Pretrial Conference Transcripts, February 20, 1998, pp. 15-16).

[5]However, it is unclear from the papers submitted by Defendants if the Wisconsin trial court dismissal and stipulation was appealed before or after the trial in this present case.

and Possessions as they have by law or usage in the courts of such state." 28 U.S.C. § 1738. The Act "thus directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state." *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 116 S. Ct. 873, 877 (1996), quoting *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-82 (1982). Federal courts must accept that state's rules for determining the effect of the judgment. *Matsushita Electric*, 116 S. Ct. at 877.

Wisconsin has adopted a transactional approach to determining claim preclusion which extinguishes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 525 N.W.2d 723, 728-9 (1995), citing Restatement (Second) of Judgments § 24 (1982). However, under Wisconsin law, trial courts have broad discretion in crafting dismissals. "[A] trial court may totally accept or reject a stipulation presented by the parties for its approval." *Phone Partners Ltd. Partnership v. C.F. Communications Corp.*, 196 Wis. 2d 702, 709, 542 N.W.2d 159, 161 (Ct. App. 1995). Once the court approves a stipulation, it becomes the court's judgment. *Id.*; Wis. Stat. § 806.07(1). Therefore, if Defendants had raised their res judicata argument before the trial in this case, this court would have recognized the final judgment of the Wisconsin trial court and would not have found that the dismissal had a preclusive effect on the present case, since the stipulation specifically states that the dismissal has no effect on the present case. Since the trial and verdict in the present case, the Wisconsin Supreme Court has reversed and remanded Judge Kahn's dismissal and stipulation, stating that the Wisconsin trial court abused its

discretion in approving the stipulation. Milwaukee Women's Medical Services, No. 98-1139-FT, May 4, 1999, p. 8. However, at the time that this court would have had to decide the preclusive effects of the Wisconsin case, this court would have had to respect the judgment of the Wisconsin trial court. It was not, and is not, the place of this court to go back and determine the legal validity of the Wisconsin trial court, but instead to respect the judgment of that court. *Kremer*, 456 U.S. at 482.

II. Rule 15(b): Amend Complaint to Conform to Evidence

The plaintiffs have moved under Fed. R. Civ. P. 15(b) to amend their complaint to include a claim arising under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248(a) ("FACE"), and state law extortion, assault, trespass, and tortious interference with prospective economic advantage. (Pls' 15(b) Motion, p. 2). The plaintiffs argue that the factual issues that underlie these claims were presented at trial. In particular, the plaintiffs assert that the defendants presented several pieces of evidence themselves that would support FACE and state law tort claims and that defendants did not object when plaintiffs presented similar evidence at trial. (Pls' 15(b) Reply, pp. 2, 4). This evidence is the same evidence that supports the predicate acts of RICO upon which the jury found the defendants liable. (Pls' 15(b) Reply, p.5). That is, no doubt, the reason that defendants failed to object.

The defendants vigorously respond that they objected to the use of any evidence that was outside of the pleadings at trial. (Dfts' Resp. to Pls' 15(b), p.2). Also, any evidence that they admitted that supports a FACE or a state law tort claim was

admitted for another purpose. (*Id.*). Finally, the defendants argue that amending the complaint to include FACE and state law tort claims would be prejudicial to the defendants, for the jury was not instructed on FACE or state law tort claims and thus no individuals were named in the jury findings. (Dfts' Resp. to Pls' 15(b), pp.6-7).

A. Standard for 15(b)

Rule 15(b) states in part:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in al respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; . . ."

Fed. R. Civ. P. 15(b)

Rule 15(b) creates a system in which "the complaint does not fix the plaintiff's rights but may be amended at any time to conform to the evidence." *Duckworth v. Franzen*, 780 F.2d 645, 649 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986). The Intent of Rule 15(b) is "to provide the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties." *In re Prescott*, 805 F.2d 719, 725 (7th Cir. 1986), quoting *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982). A Rule 15(b) amendment can occur either before, during, or after trial. Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1491 (1990).

The key factor in determining whether an amendment should

be allowed is whether the issue has been tried with the express or implied consent of the parties. *Winger v. Winger*, 82 F.3d 140, 144 (7th Cir. 1998); *Ippolito v. WNS, Inc.*, 864 F.2d 440, 456 (7th Cir. 1988); *Prescott*, 805 F.2d at 725. The test for this consent is "whether the opposing party had a fair opportunity to defend and whether he could have presented additional evidence had he known sooner the substance of the amendment." *Prescott*, 805 F.2d at 725, quoting *Hardin*, 691 F.2d at 456 (10th Cir. 1982). For an opposing party to give implied consent, the party must either have not made the objection that the evidence presented at trial was outside of the pleadings, or the opposing party must have introduced the evidence his or herself. *Prescott*, 805 F.2d at 725. Therefore, Rule 15(b) requires the opposing party to show that he or she will be prejudiced by the amendment. Wright, Miller Kane, Federal Practice and Procedure: Civil 2d § 1495 (1990). The decision as to whether the issue in the amendment was actually tried by implied or expressed consent is within the district court's discretion. *Ippolito*, 864 F.2d at 456.

While Rule 15(b) is quite liberal, that does not mean that a motion to amend a complaint will automatically be granted. "[A] court will not imply consent to try a claim merely because evidence relevant to a properly plead issue incidentally tends to establish an unpleaded claim." *Ippolito*, 864 F.2d at 456, quoting *Quillen v. International Playtex, Inc.*, 789 F.2d 1041, 1044 (4th Cir. 1986). Furthermore, if the evidence presented by the opposing party that allegedly demonstrates consent is also relevant for another purpose, then the admission of the evidence is not considered consent and the pleadings should not be amended under 15(b). Wright, Miller & Kane, § 1493 (1990); *see also*, Gorlikowski v. Tolbert, 52 F.3d 1439 (7th Cir. 1995). Rule 15(b) also does not apply when the evidence does

not support the theory upon which the court charged the jurors. *Jackson v. Crockarell*, 475 F.2d 746, 748 (6th Cir. 1973). Finally, the opposing party can defend against a 15(b) motion when the opposing party objected to the evidence during trial because it went beyond the scope of the pleadings. *Prescott*, 805 F.2d at 725.

B. Implied Consent

The plaintiffs argue that the defendants gave implied consent to the amended claims because they presented evidence themselves that supported the FACE and state law tort claims. (Pls' 15(b) Reply, p.4). However, the court finds that the evidence to which the plaintiffs allude applies to the conspiracy claim and only incidentally to the FACE and state law tort claims. Granted, several of the defendants' witnesses testified to observing or participating in various protests in front of class clinics. However, that evidence was presented in the defense of their actions as free speech and not as an act of conspiracy. Presenting that defense does not consent to federal claims of FACE or state law tort claims. Therefore, this evidence was relevant to another issue in the case.

More troubling for the court, however, is that the evidence that plaintiffs argue supports FACE and state law tort claims does not support the theory that was presented to the jury. In order for the jury to find the defendants liable under RICO, plaintiffs had to show that PLAN demonstrated conduct of an enterprise through a pattern of racketeering activity. *NOW v. Scheidler*, 1997 WL 610782, *6 (N.D.Ill. 1997), citing *Richmond v. Nationwide Cassel, L.P.*, 52 F.3d 640, 644-47 (7th 1995). The court instructed the jury that the plaintiffs had to show that PLAN was an enterprise that affected interstate

commerce and that each defendant was associated with PLAN, was involved in operating and managing PLAN, and that each defendant's participation in PLAN was through some pattern of acts illegal under RICO. (Jury Instructions).

In contrast, under FACE, an individual may have criminal or civil penalties applied to them if that individual:

> "(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining, or providing reproductive health services. . .
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services. . ."
> 18 U.S.C. § 248(a)(1, 3).

In the present case, the jury followed the verdict form and found that the defendants or other persons associated with PLAN had committed acts or threats of extortion, acts and attempts of conspiracy, acts or threats of violence, in the last ten years. (Transcript, April 20, 1998, pp. 5185-91). However, the jury did not state which defendants did these acts or when they occurred, only the total number of acts.[6] Evidence was

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[6]The jury found 21 acts or threats of extortion in violation of federal law; 25 acts or threats of extortion under state law; 25 attempts or conspiracy to do any of the previously mentioned acts; and 4 acts or threats of physical violence to persons or property. The jury also found that these acts occurred within the last ten years and proximately caused injury to the business and

(continued...)

presented at trial from before and after the enactment of FACE, so the court does not know which evidence the jury relied upon in its findings. Since individuals are not named in the jury's findings, the court does not know who was found to have the requisite intent for FACE of the state law tort claims. Since the clinic incidents from across the country were presented and the plaintiffs have not stated which state law they claim, the court also does not know which state law to apply in the amended state law tort claims.[7] Therefore, the court finds that the plaintiffs' motion to amend the complaint to conform to the evidence is denied.[8]

Finally, as discussed later, there was some evidence presented after trial as to conduct at clinics after FACE was enacted. That evidence was offered to rebut defendants' claim that injunctive relief was unnecessary because FACE provided plaintiffs with a more focused remedy for addressing clinic blockades. That evidence was limited in nature and fails to establish a basis for the injunctive relief sought.

III. Phase II Damage Trials

In the plaintiffs' Motion in Support of Phase II Trials for Absent Class Members, the plaintiffs argue the parties agreed

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[6](...continued)
property of the two clinics and the NOW class members. None of the jury's findings was based solely on blockades of clinic doors or sit-ins within clinics. (Transcript, April 20, 1998, pp. 5183-91).

[7]The issue will be addressed in more depth in the section on the damage trials.

[8]Defendants' 12(e) Motion for a More Definite Statement is denied as moot.

before trial to conduct the litigation of this case in two phases: the first phase ("Phase I") would determine if the defendants were liable under civil RICO and would feature two representative clinics for the plaintiff clinic class. Phase I of the trial was conducted in March and April of 1998 and the jury returned with a verdict in favor of the plaintiffs. The proposed second phase of the litigation ("Phase II") would be a series of damage trials at which other members of the plaintiff clinic class would have an opportunity to prove their individual monetary damages. (Pl's Motion for Phase II Reply, pp. 2-3). According to the plaintiffs, the concept of two phases of trial has ruled this case through all the stages of litigation: from discovery and the notice to class members to the final pre-trial order and the final pre-trial conference. (*Id.*). Citing the Manual for Complex Litigation, the plaintiffs argue that the two-phase model for complex class actions is common. Manual for Complex Litigation, § 33.28 at 328, 330 (3d ed. 1995); *see also Hilao v. Estate of Marcos*, 103 F.3d 767, 782 (9th Cir. 1996). Finally, the plaintiffs state that the defendants never objected to the bifurcation of the liability and damages issues for trial and in fact agreed to the two stages of trial at one of the pretrial conferences. (Pl's Motion for Phase II Reply, p.5).

The answer to the question of whether to have separate trial for litigation and damages is left to the discretion of the trial court based upon the circumstances of the case before it. Fed.R.Civ.P. 42(b); *In re Bendectin*, 857 F.2d 290, 308 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 ("Rule 42(b) is sweeping in its terms and allows the court, in its discretion, to grant a separate trial of any kind of issue in any kind of case."); *see also Davis v. Freels*, 583 F.2d 337 (7th Cir. 1978); Wright & Miller, Federal Practice and Procedure: Civil 2d § 2388, p. 481 (1995). While separate trials for separate issues in one

lawsuit is not usual in large class action suits, a two-phase model has been used to promote efficiency. *See Sterling v. Velsicol*, 855 F.2d 1188 (6th Cir. 1988); Manual for Complex Litigation, § 33.28. However, this model has not been used as frequently in RICO litigation, for the liability and damages questions are not so easily divided. Manual for Complex Litigation, §§ 33.82, 33.83, 33.86. A motion for bifurcation of the litigation is properly made at the pretrial conference. Wright & Miller, Federal Practice and Procedure: Civil 2d § 2388, p. 483 (1995); *see Krueger v. New York Telephone Co.*, 163 F.R.D. 446 (S.D.N.Y. 1995).

In the present case, the plaintiffs argue that at the discovery stage they first argued for a two-phase trial. In the plaintiffs' Brief in Opposition to Defendants' Motion for Leave to File Interrogatories, the plaintiffs cited several cases that were two-phase class action litigations. *See Robertson v. National Basketball Association*, 67 F.R.D. 691, 700 (S.D.N.Y. 1975); *Gardner v. Awards Marketing Corp.*, 55 F.R.D. 460, 463 (D.Utah 1972). (Pl's Motion for Phase II Reply, Ex. B). However, these cases were used in the support of the argument that defendants could not obtain discovery of absent class members before the class was certified, not to support an argument for the bifurcation of the case. The plaintiffs did not formally present a motion for a two-phase trial before the court at that time.

The plaintiffs argue that the Notice of Class Determination, approved by this court and sent to all women's health centers in the United States who were potential plaintiff clinic class members, included language that recognized that this litigation would occur in two phases. Part F of the Notice, titled "How to Stay in the Lawsuit," states,

"After the first phase of the trial, if Plaintiffs prevail, you may be required to provide information or even to testify in a trial or other proceeding designed to establish the amount of damages, if any, that you suffered as a result of the Defendants' acts."

(Pl's Motion for Phase II, Ex. C).

While the notice does leave open the option for a second phase of litigation, the notice in and of itself does not establish that the court ruled on the issue or that the parties consented to a two-phase trial.

In the Final Pre-Trial Order, the plaintiffs argue that a two phase trial was discussed. In the Plaintiffs' Trial Brief, the plaintiffs argued that damages for the plaintiff clinic class should be determined in a Phase II trial. (Pl's Motion for Phase II Reply, p. 4, citing Pl's Trial Brief, p. 11). Relying on General Rule 5 of the Northern District of Illinois, Standing Order on Pretrial Procedures in Civil Cases, the plaintiffs argue that the trial briefs are incorporated into the Final Pre-Trial Order and are thus binding upon the parties. (Pl's Motion for Phase II Reply, pp.4-5). The plaintiffs state that the defendants did not object to the Final Pre-Trial Order and this two-phase model for the trial was agreed to by the defendant parties at the Final Pre-Trial Conference.[9]

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[9]The exchange relied upon by plaintiffs to demonstrate that defendants agreed to a two-phase trial occurred at the Final Pre-Trial Conference:

THE COURT: Now, are there any other things that we need to take up?

MS. CLAYTON: Real quick matter. I think it goes without saying that

(continued...)

There are several problems with the plaintiffs' argument. First, the discussion in the Plaintiffs' Trial Brief of a two phase trial was presented only as a "suggestion" to the court and consisted of only one paragraph in a fifteen page brief. The court does not consider that a formal presentation of the issue to the court. While the Plaintiffs' Trial Brief was attached to a draft of the Pre-Trial Order, the Final Pre-Trial Order that was signed and entered did not contain a copy of the Plaintiff's Trial Brief. However, within the signed and entered Final Pre-Trial Order is the statement, "The parties do not agree that the issues of liability and damages of the class member clinics should be bifurcated for trial." (Final Pre-Trial Order, p. 5). The plaintiffs argue that the language only refers to the two lead plaintiff clinics in the case, Summit and DWHO, but there is no additional language in the Final Pre-Trial Order to support such an argument. All language within the Final Pre-Trial Order is binding on the parties at trial. General Rule 5.00 of the Northern District of Illinois, Standing Order Establishing Pretrial Procedure, Section 6(d). Therefore, the parties did not consent to a two-phase trial.

As to the so-called agreement by defendants to a two-phase trial at the Final Pre-Trial Conference, the answer of "Right" by one of the defense counsel and the silence of other defense counsel to the comment by plaintiffs' counsel on the scope of

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[9](...continued)

> the scope of this trial is the common question of the class action and the damages of the two lead plaintiffs, and other issues of absent class members will be reserved for later. We have never actually said that, but I assume that was the scope of it.
>
> MR. CRAIN: Right.

the trial is not considered consent by this court. The court does not consider that sidebar discussion a formal presentation of the issue of the bifurcation of the trial to the court and the court did not rule on the issue of a two-phase trial at that time.

This court has made it very clear to all parties in this case that issues that affect the proceedings of this case must be placed in writing. (Final Pre-Trial Conference Transcripts, February 20, 1998, pp.15-16; *supra*, fn. 2). The Federal Rules require it and the history of the proceedings in this case demanded it. The plaintiffs did not make a formal motion to bifurcate this litigation until after trial. A district court does not abuse its discretion when it denies a *sua sponte* motion for bifurcation when the parties did not make a motion for bifurcation prior to trial. *Bunch v. Bullard*, 795 F.2d 384, 390-91 (5th Cir. 1986). Therefore, the plaintiffs' motion in support of Phase II trials is denied.

IV. Injunctive Relief

A continuous issue in this case has been whether plaintiffs are able to petition for injunctive relief under civil RICO. Now that the trial is over and the monetary damages have been determined,[10] the issue of injunctive relief for the plaintiffs is the last issue to be addressed.

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[10]18 U.S.C. § 1964(c) provides that any civil plaintiff shall recover treble damages and a reasonable attorney's fee. Therefore, the monetary damages awarded to Summit and DWHO are trebled to $163,413.84 and $94,366.92, respectively.

A. Injunctive Relief Available under RICO

Section 1964(a) of RICO, entitled "Civil Remedies," states:

> "The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons."

This court found in an earlier opinion in this case that private parties may petition the court for injunctive relief for civil RICO violations. *NOW v. Scheidler, et al.*, 897 F. Supp. 1047 (N.D. Ill. 1995). Granted, the circuit courts are split on this issue. *Conkling v. Turner et al*, 18 F.3d 1285, 1296 (5th Cir. 1994) (declining to reach the issue, but noting the split in the circuits). The Seventh Circuit also has not ruled on this issue. However, this court is persuaded by the rationale of the opinions of the other circuits. *Lincoln House, Inc. v. Dupre*, 903 F.2d 845 (1st Cir. 1990) (declining to reach the issue, but assuming that the district court could grant equitable relief); *Foxboro Co. v. Arabian American Oil Co.*, 805 F.2d 34 (1st Cir. 1986) (finding that in order to obtain injunctive relief, plaintiff must show irreparable injury, substantial likelihood of success on the merits, a weighing of the equities in the

plaintiff's favor, and a public benefit); *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390 (5th Cir. 1986) (same); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (implying that equitable relief may be available under RICO); *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910-11 (E.D.N.Y. 1983) (reasoning that Congress did not intend "to deprive the district court of its traditional equitable jurisdiction" to grant injunctive relief for alleged violations of RICO statute); *see also* Batista, Civil RICO Practice Manual 169 (1987), § 6.13-The Availability of Injunctive Relief. This court also must follow the Supreme Court's instruction that "RICO is to be read broadly" and that the very purpose of the statute is to "supplement and strengthen the means already available for fighting crime." *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 498 (1985).

While an injunction may be an option under civil RICO, any possible injunction must pass muster under the First Amendment. The Supreme Court has noted in this very case that, "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaged in protected expression." 510 U.S. 249, 264 (1994) (J. Souter, concurrence). As this court examines the potential of an injunction, the court will follow the Seventh Circuit's instruction to address, "if necessary, . . . which of the defendants' activities, . . . are protected by the First Amendment to the United States Constitution." *NOW v. Scheidler, et al.*, 25 F.3d 1053.

B. Standard for Injunctive Relief

A party seeking a permanent injunction must show that: 1)

it has prevailed on the merits of its claim; 2) it has no adequate remedy under law; 3) the balance of equities tips in its favor, and 4) the issuance of the injunction serves the public interest. *Plummer v. American Institute of Certified Public Accountants*, 97 F.3d 220, 229 (7th Cir. 1996). Obviously the plaintiffs met the first criteria when the jury returned a verdict finding the defendants liable under civil RICO. (Transcripts, April 20, 1998, pp. 5183-5191). The final three criteria must be examined.

1. No Adequate Remedy Under Law

Since RICO expressly provides for injunctive relief, this factor does not apply, and thus the plaintiffs do not have to show that they lack an adequate remedy under law. When Congress expressly authorizes injunctive relief to enforce provisions of a statute, a party need not show the lack of a adequate legal remedy. *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 740 F.2d 566, 571 (7th Cir. 1984); *Pepsico, Inc. v. Redmond*, 1996 WL 3965 at *28 (N.D. Ill. 1995); *Special Education Services v. RREEF Performance Partnership-I, L.P.*, 13 A.D.D. 683 (N.D. Ill. 1995); *North Shore-Chicago Rehab. Inc. v. Village of Skokie*, 827 F. Supp. 497, 509 (N.D. Ill. 1993); *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 822 (N.D. Ill. 1988); *Wilk v. American Medical Association*, 671 F. Supp. 1465, 1484-85 (N.D. Ill. 1987). The Seventh Circuit has held that for a statutory injunction, "the moving party only needs to show that there is some reasonable likelihood of future violations..." *Commodity Futures Trading Commission v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979). As we shall see below, there is more than adequate evidence to make this showing.

2. Balancing the Equities and Serving the Public Interest

The threatened injury to the two classes of plaintiffs outweighs the potential harm to the defendants by an injunction. The evidence presented both at trial and at the injunction hearing shows that the defendants have a history of unlawful conduct. The jury found that in the last ten years, the defendants committed repeated acts and threats of extortion against patients, prospective patients, and clinic personnel as well as acts and threats of violence to persons and property across the United States. (Transcripts, April 20, 1998, pp. 5187-88). These acts crossed the line of expression into the realm of threatening conduct. The Supreme Court has upheld injunctions against individual protestors and organizations of protestors of reproductive health clinics when there is a history of prior unlawful conduct by the protestors. *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 374 fn. 6 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 762, 764 fn. 2 (1994). The Court in *Madsen* found that there was a significant governmental interest in the injunction in order to ensure public safety and order, to promote free flow of traffic on the streets and sidewalks, to protect property rights, and to protect a woman's freedom to seek pregnancy-related services. *Madsen*, 512 U.S. at 762. Considering the evidence relied upon by the jury in this case, and the evidence presented to the court in the injunction hearing on the actions of the defendants, the governmental interests are significant enough to justify a tailored injunction.

C. The Necessity of an Injunction in light of FACE

This court held a post-trial hearing to address the issue of whether the passage of FACE has addressed the defendants' conduct and thus has eliminated the need for an injunction in the present case. FACE was passed by Congress in May of 1994. At the hearing, evidence was presented of defendants' illegal activity since the passage of FACE. For example, plaintiffs presented evidence of butyric acid being placed in a reproductive health clinic in Orlando, Florida in May of 1998 during Operation Rescue's national rescue week in Orlando as well as videotape evidence of defendants blocking clinic doors and physically accosting plaintiffs as they attempted to enter a clinic in Chicago in August of 1996. (Transcripts, June 30, 1998, pp. 45-46, 92-95). Evidence was also presented of "lock and blocks" at a clinic in Milwaukee where defendants physically locked their bodies to automobiles that were parked in front of the clinic's doors, making it impossible for clinic staff and patients to enter the clinic. (Transcripts, June 30, 1998, pp. 97-98). These "lock and blocks" have been continuing in Milwaukee on an almost weekly basis since May of 1994. (Transcripts, June 30, 1998, p.98). Plaintiffs' witnesses testified at the hearing that various injunctions under FACE have been sought and implemented in order to address these activities, but the illegal conduct of the defendants continues as defendants cross state lines to avoid the jurisdiction of the various injunctions. (Transcripts, June 30, 1998, pp. 55, 73). Moreover, there was testimony supporting the conclusion that blitzkrieg tactics were sometimes used to swoop in on a clinic without warning so as to overwhelm available law enforcement personnel. (Transcripts, p. 4091).

This court finds that the defendants, as an enterprise, have

continued to engage in illegal behavior that violates civil RICO since the passage of FACE and thus there is a significant governmental interest in ordering an injunction to enjoin such illegal conduct. The injunction should be national in scope, for plaintiffs have shown that injunctions that are geographically limited do not prevent defendants from engaging in illegal conduct. Where the need for an injunction is nationwide, the courts have consistently held that an injunction can and should be nationwide in scope both in the abortion protest context, *United States v. Dinwiddie*, 76 F.3d 913, 929 (8th Cir. 1996); *United States v. Roach*, 947 F. Supp. 872, 878 (E.D. Pa. 1996); *United States v. McMillan*, 946 F. Supp. 1254, 1270 (S.C. Miss. 1995); as well as in other contexts. *United States v. Carson*, 52 F.3d 1173, 1184-85 (2d Cir. 1995); *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987); *Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985). The Eight Circuit in *United States v. Dinwiddie* upheld a national permanent injunction against an individual anti-abortion protestor. The court in *Dinwiddie* found that not only was there a significant governmental interest in protecting the particular clinic staff and patients involved in the case, but in protecting the staff and patients of other reproductive health facilities throughout the country from the illegal conduct of the defendant. *Dinwiddie*, 76 F.3d at 929. The court recognized that the defendant "could easily frustrate the purpose and spirit of the permanent injunction simply by stepping over state lines and engaging in similar activity at another reproductive health facility." *Id.*, quoting the district court, 885 F. Supp. 1286, 1296 (W.D.Mo. 1995). Considering the evidence of defendants' illegal conduct across the United States, the reasoning of *Dinwiddie* applies squarely to this case.

D. Conduct versus Speech

The defendants argue that an injunction would be a direct ban on protected speech and thus would be unconstitutional. (Dfts' Memo in Opp. to Inj., pp. 7-8). However, the Supreme Court has held that there is a distinction between speech and conduct. While speech is constitutionally protected, if the speech is used to threaten, incite or organize criminal acts, the speech loses its protection. *Madsen*, 512 U.S. at 773 (threats are proscribable under the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (speech infused with violence are indistinguishable from physical threats); *RAV v. City of St. Paul*, 505 U.S. 377, 383, 386 (1992) (fighting words are not protected by the First Amendment). *See also*, *United States v. Wilson*, 154 F.3d 658 (7th Cir. 1998) (an illegal course of conduct is not protected by the First Amendment merely because the conduct was carried out by speech).

The injunction restrains specific behavior of defendants that the courts have held are not protected: obstructing or interfering with the access to a reproductive health facility, *Schenck*, 519 U.S. at 367 n. 3; *Madsen*, 512 U.S. at 759-61; trespassing, *Id.*; *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 684 (9th Cir. 1998); *Roach*, 947 F. Supp. at 878; damaging property, *Portland Feminist*, 859 F.2d at 684; and using violence or threats of violence, *McMillan*, 946 F. Supp. at 1254. The Seventh Circuit has distinguished between conduct and speech in the arena of anti-abortion protesting: "[Physically impeding entry to a reproductive health facility] goes beyond protest and interferes with the personal liberty and property rights of others. While it is expressive conduct, it is not protected by the First Amendment." *Wilson*, 154 F.3d at 663. The injunction still leaves open many avenues for

defendants to express their anti-abortion beliefs. For example, the injunction does not enjoin protected actions such as peaceful picketing, public speeches, pamphleteering, praying, or sidewalk counseling.[11]

E. Prior Restraint

The defendants argue that an injunction would be a prior restraint on speech, for it would have a chilling effect upon speech. (Dft's Memo in Opp. to Inj., p. 6). However, the Supreme Court has rejected this prior restraint argument in two cases involving injunctions against anti-abortion protestors. In *Madsen*, the Court held, "not all injunctions that may incidentally affect expression, however, are 'prior restraints' in the sense that the term was used in *New York Times Co.* [*v. United States*, 403 U.S. 713 (1971)] or *Vance* [*v. Universal Amusement Co.*, 445 U.S. 308 (1980)]. Here, petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the ... buffer zone." 512 U.S. at 764, fn. 2. In *Schenck*, once again the Supreme Court rejected the prior restraint argument, for the injunction left alternative channels of communication open to protestors and the injunction was issued because of the illegal conduct of the defendants, not because of the content of their expression. 519 U.S. at 374, fn. 6. The same is true in this case. The record shows systematic illegal conduct by the defendants against the classes of plaintiffs. The injunction still allows a variety of options for the defendants to express their views. This case is about political means and ends. While the political ends of the defendants--to

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[11]*See* footnote 20, *infra*, for definition of sidewalk counseling.

convince the public of the need to protect what they characterize as "unborn children"--are constitutionally protected by the First Amendment, a number of their means--destroying property and threatening violence--are not.

V. The Injunction

This case has come to the Court on the request of the Certified Plaintiff Classes[12] and the members of NOW whom NOW represents for a Permanent Nationwide Injunction.

The Court having heard the evidence presented at the trial of this case from March 5, 1998 through April 14, 1998, after which a jury ruled in Plaintiffs' favor on all issues; and having heard additional evidence, without any advisory jury, from June 30, 1998 through July 2, 1998;

The Court hereby finds and orders:

1. The Defendants[13] have violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et*

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[12]The Plaintiff Class of Clinics and the Plaintiff Class of Women are defined in this Court's Order dated March 28, 1997 as follows:

> The Clinic Class: The class of all women's health centers in the United States at which abortions are performed.
>
> The NOW Non-Member Class: The class of women who are not NOW members and whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities.

[13]Randall A. Terry entered into a Settlement Agreement with Plaintiffs prior to trial. This Order does not apply to him.

seq., by operating an enterprise, the Pro Life Action Network ("PLAN"), through a pattern of numerous, repeated acts of racketeering that interfered with the Plaintiff Clinics' right to provide medical services, including but not limited to abortions, and the right of NOW members and the Plaintiff Class of women to obtain those services.

2. The evidence presented at trial established a likelihood that similar illegal conduct would be committed in the future by the Defendants and/or others acting in concert with them.

The Conduct Enjoined

3. Defendants Joseph Scheidler, Andrew Scholberg, Timothy Murphy, Pro-Life Action League, Inc., and Operation Rescue, a/k/a Operation Rescue National (the "Defendants"), and each of their officers, directors, agents, representatives, servants, employees, attorneys and any other on their behalf or in concert with them, are hereby enjoined from directly or indirectly[14]:

   a. interfering with the right of any member of the Certified Class of Plaintiff Clinics to conduct its business (including but not limited to the right to provide abortion services) or the right of any NOW member or any member of the Certified Class of women to avail herself of the Plaintiff Clinics' services (included but not limited

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[14] *Madsen v. Women's Health Center*, 512 U.S. 753, 775 (1994); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681, 687 (9th Cir. 1988); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1355 (3rd Cir. 1989).

to abortion services), by:

(1) blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of any Plaintiff Clinic;[15]

(2) trespassing on the premises or the private property of any Plaintiff Clinic;[16]

(3) destroying, damaging or stealing property of any Plaintiff Clinic, its employees, volunteers, or any woman who seeks to use the services of such a Clinic;[17]

(4) using violence or threat of violence against any Plaintiff Clinic or any of its employees, volunteers, or any woman who seeks to use the services of such a Clinic;[18]

b. aiding, abetting, inducing, directing, or inciting

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[15]*Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 367 n.3 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 759-61 (1994).

[16]*Schenck*, 519 U.S. at 367 n.3 (1997); *Madsen*, 512 U.S. at 759 (1994); *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 684 (9th Cir. 1988); *United States v. Roach*, 947 F. Supp. 872, 878 (E.D. Penn. 1996).

[17]*Portland*, 859 F.2d at 684 (9th Cir. 1988).

[18]*United States v. McMillan*, 946 F. Supp. 1254 (S.C. Miss. 1995).

any of the acts enumerated in subsection a. of this paragraph (the "Acts") through any of the Defendants or through others;[19] or

c. operating an enterprise through any of the Acts described above.

4. This injunction does not prohibit or preclude expressive activities that are constitutionally protected, including but not limited to the following conduct:

a. Peacefully carrying picket signs on the public property in front of any Plaintiff Clinic;

b. Making speeches on public property;

c. Speaking to individuals approaching the clinic;[20]

d. Handing out literature on public property; and

e. Praying on public property.[21]

5. This injunction shall bind Defendants Joseph Scheidler; Andrew Scholberg; Timothy Murphy; the Pro-Life

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[19]*Schenck*, 519 U.S. at 367 n.3 (1997); *Madsen*, 512 U.S. at 761 (1994).

[20]This activity is also referred to as "sidewalk counseling." Sidewalk counseling has been defined by the Supreme Court as "...a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel..." *Schenck*, 519 U.S. 357 (1997).

[21]*Roach*, 947 F. Supp. at 878 (E.D. Penn. 1996).

Action League, Inc.; and Operation Rescue, a/k/a Operation Rescue National, and each of their officers, agents, servants, employees and attorneys, and all other persons in active concert with them, and who have actual or constructive notice of this Order, and any other person acting in concert with PLAN. Notice of this Order may be given to each such person by hand delivery, First Class Mail, Certified Mail, facsimile, or by reading a copy of this order aloud. Such reading may be accomplished by any representative of a Plaintiff Clinic or by any federal, state or local law enforcement personnel.

6. This injunction shall be enforceable by the U.S. Marshall Service and by any other federal, state or local law enforcement authority, each of whom is hereby authorized to arrest any person who appears to be in disobedience of this injunction. The arrestee may be taken before any federal judge or magistrate in the jurisdiction in which the arrest is made. Violation of this injunction may subject the Defendant, or any person within the scope of this injunction, to prosecution for criminal or civil contempt of court, and to the imposition of any penalties available under the law, including but not limited to incarceration or detention, the posting of a bond, monetary penalties, payment of damages to any aggrieved persons or entities, payment of reasonable attorney's fees and costs in connection with a contempt action, and other sanctions deemed appropriate by the

court.[22]

Retention of Jurisdiction

7. The Court shall retain jurisdiction to enforce the terms of this injunction for twelve (12) years from the date below.

Conclusion

For the foregoing reasons, Defendants Joseph Scheidler and Operation Rescue's motion for decertification of the two classes is DENIED. Plaintiffs National Organization for Women, Delaware Women's Health Clinic, and Summit Women's Health Clinic's motion to amend the complaint to conform to evidence is DENIED. Plaintiffs' motion for Phase II damage trials is DENIED. The court GRANTS the plaintiffs' petition for a permanent injunction to be placed upon defendants for a period of twelve (12) years. All other motions are denied as moot. This case is now closed.

Enter:

David H. Coar
United States District Judge
Dated: July 16, 1999

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[22]*United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996) (referring to language of injunction quoted in 885 F. Supp. 1286, 1298 (W.D. Mo. 1995)); *Roach*, 947 F. Supp. at 878 (E.D. Penn. 1996).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,	)	
Plaintiffs,	)	**No. 86 C 7888**
v.	)	**Hon. David H. Coar**
JOSEPH M. SCHEIDLER, et al.,	)	
Defendants.	)	

JUDGMENT IN A CIVIL CASE

This action came before the court for a trial by jury, and the issues having been duly tried and the jury having duly rendered its verdict, and the Court having ruled on the parties' post-trial motions, in its Memorandum Opinion and Order dated July 16, 1999.

IT IS HEREBY ORDERED AND ADJUDGED that judgment be entered in favor of plaintiffs as follows:

1. Plaintiff Summit Women's Health Organization, Inc., have and recover from the defendants, Joseph M. Scheidler,

Andrew Scholberg, Timothy Murphy, Pro-Life Action League, Inc., and Operation Rescue, jointly and severally, the sum of $163,413.84, the jury verdict of $54,471.28 trebled under RICO, with interest on this amount at the rate provided under 28 U.S.C. § 1961 from the date of this judgment until paid.

2. Plaintiff Delaware Women's Health Organization, Inc., have and recover from the defendants, Joseph M. Scheidler, Andrew Scholberg, Timothy Murphy, Pro-Life Action League, Inc., and Operation Rescue, jointly and severally, the sum of $94,366.92, the jury verdict of $31,455.64 trebled under RICO, with interest on this amount at the rate provided under 28 U.S.C. § 1961 from the date of this judgment until paid.

3. Plaintiff National Organization for Women, Inc., have and recover from the defendants, Joseph M. Scheidler, Andrew Scholberg, Timothy Murphy, Pro-Life Action League, Inc., and Operation Rescue, jointly and severally under RICO, attorneys fees and related nontaxable expenses. A determination of attorneys fees and related nontaxable expenses under RICO is deferred until further order of Court.

4. Plaintiffs are awarded their taxable costs pursuant to 28 U.S.C. § 1920; Plaintiffs shall file their bill of costs within thirty (30) days of the entry of this Judgment, consistent with Local Rule 45.

5. A permanent injunction is entered as follows:

a. Defendants Joseph Scheidler, Andrew Scholberg, Timothy Murphy, Pro-Life Action League, Inc., and Operation Rescue, a/k/a Operation Rescue

National (the "Defendants"), and each of their officers, directors, agents, representatives, servants, employees, attorneys and any other on their behalf or in concert with them, are hereby enjoined from directly or indirectly:

i. interfering with the right of any member of the Certified Class of Plaintiff Clinics[1] to conduct its business (including but not limited to the right to provide abortion services) or the right of any NOW member or any member of the Certified Class of women[2] to avail herself of the Plaintiff Clinics' services (including but not limited to abortion services) by:

(1) blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of any Plaintiff Clinic;

(2) trespassing on the premises or the

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[1]The Plaintiff Class of Clinics is the class of all women's health centers in the United States at which abortions are performed.

[2]The Class of Women is the class of women who are not NOW members and whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities.

private property of any Plaintiff Clinic;

(3) destroying, damaging or stealing property of any Plaintiff Clinic, its employees, volunteers, or any woman who seeks to use the services of such a Clinic;

(4) using violence or threat of violence against any Plaintiff Clinic or any of its employees, volunteers, or any woman who seeks to use the services of such a Clinic;

ii. aiding, abetting, inducing, directing, or inciting any of the acts enumerated in subsection (a) of this paragraph (the "Acts") through any of the Defendants or through others;

iii. operating an enterprise through any of the Acts described above.

b. This injunction does not prohibit or preclude expressive activities that are constitutionally protected, including but not limited to the following conduct:

i. Peacefully carrying picket signs on the public property in front of any Plaintiff Clinic;

ii. Making speeches on public property;

iii. Speaking to individuals approaching the clinic[3];

iv. Handing out literature on public property; and

v. Praying on public property.

c. This injunction shall bind Defendants Joseph Scheidler, Andrew Scholberg, Timothy Murphy, Pro-Life Action League, Inc., and Operation Rescue, a/k/a Operation Rescue National (the "Defendants"), and each of their officers, agents, servants, employees, and attorneys, and all other persons in active concert with them, and who have actual or constructive notice of this Order, and any other person acting in concert with PLAN. Notice of this Order may be given to each such person by hand delivery, First Class Mail, Certified Mail, facsimile, or by reading of copy of this order aloud. Such reading may be accomplished by any representative of a Plaintiff Clinic or by any federal, state or local law enforcement personnel.

d. This injunction shall be enforceable by the U.S. Marshall Service and by any other federal, state or local law enforcement authority, each of whom is

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[3]This activity is also referred to as "sidewalk counseling." Sidewalk counseling has been defined by the Supreme Court as ". . . a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel. . ."

hereby authorized to arrest any person who appears to be in disobedience of this injunction. The arrestee may be taken before any federal judge or magistrate in the jurisdiction in which the arrest is made. Violation of this injunction may subject the Defendant, or any person within the scope of this injunction, to prosecution for criminal or civil contempt of court, and to the imposition of any penalties available under the law, including but not limited to incarceration or detention, the posting of a bond, monetary penalties, payment of damages to any aggrieved persons or entities, payment of reasonable attorney's fees and costs in connection with a contempt action, and other sanctions deemed appropriate by the court.

6. The Court shall retain jurisdiction to enforce the terms of the above-described injunction for twelve (12) years.

August 25, 1999

/s/ David H. Coar
The Honorable David H. Coar
District Court Judge

APPENDIX F

Nos. 99-3076, 99-3336, 99-3891, 99-3892, and 01-2050

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

National Organization for Women, Inc., on behalf of itself and its women members and all other women who use or may use the services of women's health centers that provide abortions, and Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., on behalf of themselves and the class of all women's health centers in the United States at which abortions are performed, Plaintiffs-Appellees,

v.

Joseph M. Scheidler, Pro-Life Action League, Inc., Andrew D. Scholberg, Timothy Murphy, and Operation Rescue, Defendants-Appellants.

September 14, 2000, Argued
October 2, 2001, Decided

Before Rovner, Diane P. Wood, and Evans, Circuit Judges.

Diane P. Wood, *Circuit Judge*. This case is in its fifteenth year of contentious litigation. The defendants are anti-abortion activists who employ a protest tactic they call "rescues," in which they and other activists physically block access to abortion clinics so that the patients and staff cannot get in or

out of the buildings. Plaintiffs use words less benign than "rescue" to describe the defendants' activities. We will refer to them as "protest missions," in the hopes that this will be understood as a neutral term. The defendants' goal is frankly to prevent abortions from taking place. Participants in the protest missions engage in a substantial amount of protected speech, including efforts to persuade clinic patients not to have abortions and to persuade clinic doctors and staff to quit performing abortions. Unfortunately, the protest missions also involve illegal conduct: protesters do everything from sitting or lying in clinic doorways and waiting to be arrested to engaging in more egregious conduct such as entering the clinics and destroying medical equipment and chaining their bodies to operating tables to prevent the tables from being used. In a few instances, protesters apparently have physically assaulted clinic staff and patients. In addition to staging these protests, the defendants have issued letters and statements to other clinics threatening to stage missions at those clinics unless they voluntarily shut down.

The plaintiffs, the National Organization for Women (NOW) and two clinics that were the targets of protest missions, brought this class action alleging, among other things, that the defendants' conduct amounted to a pattern of extortion which violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). The trial judge certified two classes: one, represented by NOW, of all NOW members and non-members who have used or would use the services of an abortion clinic in the United States, and a second of all such clinics. After a trip through this court to the Supreme Court of the United States during which many of the legal issues in the case were clarified or resolved, the case was remanded to the district court for trial of the plaintiffs' RICO claims. A jury found for the plaintiffs and awarded damages to the two named

clinics, and the district court issued a permanent nationwide injunction prohibiting the defendants from conducting blockades, trespassing, damaging property, or committing acts of violence at the class clinics. The defendants have appealed a wide range of issues relating to the conduct of the trial and the issuance of the injunction. We find that the district court navigated its way through this complex and difficult case with care and sensitivity and affirm its judgment in all respects.

I

Many of the facts pertinent to this opinion are set out in the Supreme Court's decision remanding the case, *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) (*NOW I*), and in our earlier decision in the case, *National Organization for Women, Inc. v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), and we will not recount them in detail here. Nonetheless, in order to put the defendants' appeal in context, a brief overview of the facts presented at trial and of the procedural history of the case may be helpful.

The individual defendants, Joseph Scheidler, Andrew Scholberg, and Timothy Murphy are on the Board of Directors of one of the corporate defendants, the Pro-Life Action League (PLAL). The other corporate defendant is Operation Rescue. (Randall Terry, the director of Operation Rescue, was also originally a defendant in the case, but he has since settled with the plaintiffs). All of the defendants were among the organizers of the Pro-Life Action Network (PLAN), which is a loose national organization of groups that engage in protest missions and other aggressive anti-abortion tactics. Beginning in the mid-1980's, PLAN held annual conventions, organized in part by the defendants here, which included seminars on protest strategies. Those conventions concluded with protest missions

being staged in the convention city. PLAN also sent a newsletter to its members and coordinated a hotline that potential protesters could call to get information about upcoming missions. The plaintiffs alleged, and at trial the jury found, that PLAN was an "organization or enterprise" for purposes of RICO liability.

Initially, the plaintiffs alleged that the defendants' tactics violated both RICO and federal antitrust law. In 1992, however, this court issued an opinion dismissing both theories of liability, reasoning that the antitrust laws were not applicable because the plaintiffs had not alleged that the defendants exercised any form of market control over the supply of abortion services and that RICO did not reach the defendants' conduct because the plaintiffs had not shown that the alleged racketeering acts were "economically motivated." 968 F.2d at 617-30. The Supreme Court granted certiorari on the limited question whether RICO requires proof that either the racketeering enterprise or the alleged predicate acts were motivated by an economic purpose. (The antitrust holding of our 1992 decision was thus left undisturbed.) The Court concluded that RICO contains no such economic motive requirement and therefore reversed our decision on that point. 510 U.S. at 256-62. Thereafter, we remanded the case to the district court for trial of the plaintiffs' RICO claims.

During the course of the seven-week trial, the plaintiffs introduced evidence of hundreds of acts committed by the defendants or others acting in concert with PLAN which, the plaintiffs contended, constituted predicate acts under RICO. The alleged predicate acts included violations of federal extortion law (the Hobbs Act, 18 U.S.C. § 1951), state extortion law, the federal Travel Act, 18 U.S.C. § 1952, and conspiracy to violate these laws. A few of the more egregious acts the plaintiffs alleged included:

> At a protest mission in Chico, California, protesters pressed four clinic staff members up against a glass entranceway to the clinic for several hours and refused to let them go even when they complained they were being crushed. The glass wall eventually either loosened or shattered, injuring a clinic staffer.
>
> At a similar mission in Los Angeles, protesters grabbed at a patient's arms and legs and tried to restrain her physically from entering the clinic. The patient was actually at the clinic for a follow-up to ovarian surgery, and the attack by the protesters reopened her incisions. As a result of the attack, the patient had to be rushed to the hospital.

In several instances, protesters entered clinics and destroyed medical equipment.

In several cases, protesters not only blocked doorways with their bodies, but chained themselves to the doorways of clinics, or, in some cases, to operating tables inside clinics.

In December 1985, defendant Scheidler sent letters to every abortion provider in the Chicago area calling for a "Christmas Truce." In these letters, he requested that the clinics shut down for a specific day in December, stated that he would "call to confirm" the clinic's decision, and warned that non-complying clinics would be subjected to "non-violent direct action," a catch-phrase PLAN and PLAL frequently used for their activities.

Based on this and other evidence in the voluminous record that was created at the trial, the jury found in response to special interrogatories that the defendants or others associated with PLAN committed 21 violations of the Hobbs Act, 25 violations of state extortion law, 25 acts of conspiracy to violate federal or state extortion law, four acts or threats of

physical violence, 23 violations of the Travel Act, and 23 attempts to commit one of these crimes. The jury awarded damages to both clinics; once the damages were trebled, as RICO requires, the awards totaled over $ 163,000 to Summit Women's Health Organization and over $ 94,000 to Delaware Women's Health Organization.

After the jury returned its verdict, the district court held three days of additional hearings and then entered a permanent, nationwide injunction prohibiting the defendants or those acting in concert with them from interfering with the rights of the class clinics to provide abortion services, or with rights of the class women to receive those services, by obstructing access to the clinics, trespassing on clinic property, damaging or destroying clinic property, or using violence or threats of violence against the clinics, their employees and volunteers, or their patients.

II

Initially, we must consider the defendants' contention that RICO does not permit private plaintiffs to seek injunctive relief. The only court of appeals to have addressed this issue directly, the Ninth Circuit, concluded in 1986 that private plaintiffs cannot seek injunctions under RICO, relying largely on the court's reading of the statute's legislative history. *See Religious Tech. Ctr. v. Wollersheim,* 796 F.2d 1076 (9th Cir. 1986). The other courts of appeals that have addressed the point in *dicta* are split. *Compare Johnson v. Collins Ent'mt. Co.,* 199 F.3d 710, 726 (4th Cir. 1999), *In re Fredeman Litig.,* 843 F.2d 821, 828-30 (5th Cir. 1988), and *Trane Co. v. O'Connor Sec.,* 718 F.2d 26, 28-29 (2d Cir. 1983) (expressing doubt about availability of injunctive relief for private plaintiffs), *with Bennett v. Berg,* 710 F.2d 1361, 1366 (8th Cir.

1983) (McMillan, J., concurring) (suggesting injunctive relief is available); *see also Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990), *Northeast Women's Ctr. v. McMonagle*, 868 F.2d 1342, 1355 (3d Cir. 1989) (noting controversy but expressing no opinion on resolution). Our study of Supreme Court decisions since the 1986 *Wollersheim* opinion convinces us that the approach of the Ninth Circuit (which relied almost exclusively on the legislative history of RICO to reach its result, as opposed to the actual language of the statute) no longer conforms to the Court's present jurisprudence, assuming for the sake of argument that it was a permissible one at the time. We are persuaded instead that the text of the RICO statute, understood in the proper light, itself authorizes private parties to seek injunctive relief.

In interpreting the remedial provisions of the RICO statute, our inquiry begins with the statute's text, and, if the text is unambiguous, it ends there as well. *See Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 1520-21 & n.7 (2001); *NOW I*, 510 U.S. at 261. RICO's civil remedies section provides, in pertinent part:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to . . . imposing reasonable restrictions on the future activities . . . of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, . . . or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court

> may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . .

18 U.S.C. § 1964.

Both parties have offered interpretations of this text that support their positions. The plaintiffs read the statute in a straightforward manner. Section 1964(a), they contend, grants the district courts jurisdiction to hear RICO claims and also sets out general remedies, including injunctive relief, that all plaintiffs authorized to bring suit may seek. Section 1964(b) makes it clear that the statute is to be publicly enforced by the Attorney General and it specifies additional remedies, all in the nature of interim relief, that the government may seek. Section 1964(c) similarly adds to the scope of § 1964(a), but this time for private plaintiffs. Those private plaintiffs who have been injured in their business or property by reason of a RICO violation are given a right to sue for treble damages. As the plaintiffs note, this reading of the statute gives the words their natural meaning and gives effect to every provision in the statute.

The defendants argue for a less intuitive interpretation. Relying on *Wollersheim,* they argue that § 1964(a) is purely a jurisdictional provision authorizing the district court to hear RICO claims and to grant injunctions to parties authorized by other provisions of the law to seek that form of relief. Section

1964(b), in the defendants' view, allows the Attorney General to institute RICO proceedings and authorizes the government to seek not only the relief described in that subsection, but also the relief described in § 1964(a). Section 1964(c) then provides a limited right of action for private parties. They read the two clauses of § 1964(c), however, as tightly linked provisions, under which private plaintiffs may sue *only* for monetary damages. The mention of this type of relief in the second clause must mean, the defendants argue, that by implication no other remedies, particularly injunctive remedies, are available. We cannot agree that this is a reasonable reading of the statute.

As an initial matter, we note that the *Wollersheim* decision apparently misreads § 1964(b) when it states that § 1964(b) explicitly "permits *the government* to bring actions for equitable relief." *Wollersheim,* 796 F.2d at 1082. Section 1964(b) does allow the government to seek equitable relief, but it specifically mentions only *interim* remedies. Although no one doubts that permanent injunctions are also available to the government, the government's ability to seek permanent, as opposed to interim, equitable remedies comes from the general grant of authority for district courts to enter injunctions found in § 1964(a), not from anything in § 1964(b). (The sentence "the Attorney General may institute proceedings under this section" is in that respect the equivalent of the first clause in § 1964(c), which says "any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court . . . ." Neither one addresses what remedy the plaintiff may seek.) Given that the government's authority to seek injunctions comes from the combination of the grant of a right of action to the Attorney General in § 1964(b) and the grant of district court authority to enter injunctions in § 1964(a), we see no reason not to conclude, by parity of reasoning, that private

parties can also seek injunctions under the combination of grants in §§ 1964(a) and (c).

In addition, we cannot agree with the defendants' contention that § 1964(a) is a purely "jurisdictional" statute, despite the Ninth Circuit's characterization of it in that way in *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1307 (9th Cir. 1992) (construing *Wollersheim* holding as jurisdictional). What § 1964(a) does is to grant district courts authority to hear RICO claims and then to spell out a non-exclusive list of the remedies district courts are empowered to provide in such cases. In that sense, § 1964(a) is strikingly similar to the statute the Supreme Court construed in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998). The statute at issue in *Steel Co.* provided that "the district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement." *Id.*, quoting 42 U.S.C. § 11046(c). Noting that "'jurisdiction' . . . is a word of many, too many, meanings," the Court held that it would be "unreasonable to read [the statute] as making all the elements of the cause of action under subsection (a) jurisdictional, rather than as merely specifying the remedial *powers* of the court, viz., to enforce the violated requirement and to impose civil penalties." *Id.* This part of the *Steel Co.* holding supersedes any rationale to the contrary that the courts of appeals may have followed in earlier years. We find that it is applicable to RICO and that § 1964(a) both confers jurisdiction on the district courts and specifies certain remedial powers that the courts will have in cases brought before them.

Once we accept that § 1964(a) is not purely jurisdictional, but also describes remedies available under RICO, the defendants' position becomes untenable. In the defendants'

view, despite the general provisions for equitable relief in § 1964(a), injunctive relief is not available to any particular plaintiff unless it is also provided by some other section of the statute. This reading renders § 1964(a)'s provision for injunctive relief a nullity. Because an alternative reading exists which gives meaning to every section of the statute, *see Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("courts should disfavor interpretations of statutes that render language superfluous"), we reject the defendants' approach.

The defendants' final textual argument springs from the maxim that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). While we have no doubt that this is good advice as a general matter, we do not find it particularly helpful in this case. This is not a situation in which Congress has provided for a private damages remedy and has remained silent as to the availability of injunctive relief. Instead, Congress explicitly provided for injunctive relief in § 1964(a), although it did not specify in that section which plaintiffs can seek such relief. Given that the next two sections describe two types of plaintiffs, the government and private plaintiffs, and spell out additional remedies specific to each type, we find that the only logical conclusion is that Congress intended the general remedies explicitly granted in § 1964(a) to be available to all plaintiffs.

Although we would be confident resting our holding purely on the plain text of § 1964, we note that our interpretation is consistent with Congress's admonition that the RICO statute is to be "liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). Adhering to this admonition, which "obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading

of the statute," *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993), the Supreme Court has consistently rejected interpretations by the courts of appeals that would limit the scope of RICO actions in ways not contemplated by the text of the statute. *See, e.g., Cedric Kushner Promotions, Ltd. v. King*, 121 S. Ct. 2087 (2001) (rejecting argument that employee of corporation acting within scope of employment cannot be a "person" distinct from the corporation); *Salinas v. United States*, 522 U.S. 52, 61-66 (1997) (rejecting requirement that conspiracy defendant himself has committed predicate acts); *NOW I*, 510 U.S. at 256-62 (rejecting requirement that enterprise have an economic motive); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (rejecting requirements that defendant has been convicted of predicate act and that plaintiff has suffered a "racketeering injury," as opposed to injury from mere predicate acts); *United States v. Turkette*, 452 U.S. 576 (1981) (rejecting argument that RICO enterprise must have legitimate as well as illegitimate aspects). RICO's liberal-construction clause has particular force, as the Supreme Court has stated, when we are construing § 1964, the civil remedy provision, because it is in this section that "RICO's remedial purposes are most evident." *Sedima*, 473 U.S. at 491 n.10. In keeping with the spirit of these cases, we decline to restrict the remedies available under RICO, when Congress has provided for broad equitable relief under § 1964(a).

Our interpretation of § 1964 is also in keeping with the underlying purposes of the RICO statute. As the Supreme Court recently noted, Congress in enacting RICO intended to "encourage civil litigation to supplement Government efforts to deter and penalize the . . . prohibited practices. The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." *Rotella v. Wood*, 528 U.S.

549, 557 (2000). Recognizing that the statute gives private citizens the ability to seek injunctive relief as well as damages is fully consistent with this role for civil RICO litigation.

Perhaps realizing that the plain text of the statute strongly suggests that private plaintiffs can seek injunctions, the *Wollersheim* court relied heavily in its decision on two pieces of legislative history. First, the court noted that, during the floor debate on the bill in the House, Representative Steiger, the House sponsor of the bill, introduced an amendment that would have, among other things, made private plaintiffs' right to seek injunctive relief explicit. The amendment was withdrawn after another representative described it on the House floor as creating "an additional civil remedy." *See Wollersheim,* 796 F.2d at 1085-86. Second, the court noted that one year after the bill's passage, Congress failed to pass a bill introduced in the Senate with the same language as the Steiger amendment. *See id.* at 1086. From these two occurrences, the Ninth Circuit concluded that "in considering civil RICO, Congress was repeatedly presented with the opportunity expressly to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress rejected the addition of any such provision." *Id.*

Again, with respect, we cannot agree with the Ninth Circuit that these snippets of legislative history amount to the kind of "'clearly expressed legislative intent to the contrary'" that we would require to cast doubt on unambiguous statutory language. *NOW I,* 510 U.S. at 261. Even these excerpts do not unequivocally indicate that Congress intended private plaintiffs to be limited to damages remedies. As the *Wollersheim* decision itself notes, there are indications in the legislative history to the contrary. 796 F.2d at 1085. More importantly, however, although the *Wollersheim* court may well have made a reasonable decision in 1986 to rely on Congress's refusal to

enact amendments to the statute, recent Supreme Court precedent teaches that this type of legislative history is a particularly thin reed on which to rest the interpretation of a statute. *See, e.g., Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs,* 531 U.S. 159, 169-70 (2001) ("Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute. A bill can be proposed for any number of reasons, and it can be rejected for just as many others."); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 187 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."). Given the Court's reluctance in recent years to rely on the type of legislative history that underpins *Wollersheim,* we cannot agree with the Ninth Circuit's earlier view that this legislative history trumps the otherwise plain language of § 1964.

In a last effort to save their reading of the statute, the defendants urge us that certain differences between the language of RICO and the language of section 4 of the Clayton Act (on which RICO was based) demand the inference that no private right to injunctive relief exists under RICO. The Clayton Act, they note, provides private rights of action in two separate sections: one for damages in § 4, 15 U.S.C. § 15(a), and one for injunctive relief in § 16, 15 U.S.C. § 26. RICO, in contrast, has only one statutory section addressing civil remedies, and the only subsection that specifically talks about private actions mentions only damages. Defendants argue that Congress's failure to include in § 1964(c) language analogous to that in Clayton Act § 16 must mean that it did not intend to allow private parties to seek injunctions.

We reject this line of analysis for a number of reasons. First,

the mere fact that the Clayton Act spreads its remedial provisions over a number of different sections of the U.S. Code,[1] and RICO does not, adds little to our understanding of either statute. More importantly, the Supreme Court regularly treats the remedial sections of RICO and the Clayton Act identically, regardless of superficial differences in language. *See, e.g., Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188-89 (1997) (applying Clayton Act rule for accrual of cause of action to RICO); *Holmes v. SIPC*, 503 U.S. 258, 267 (1992) (applying proximate cause rule to RICO). Since the Court has already determined that litigants other than the Attorney General may obtain broad injunctive relief under the Clayton Act, *see California v. American Stores Co.*, 495 U.S. 271 (1990), cases like *Klehr* and *Holmes* indicate that we ought to adopt the same interpretation with respect to RICO. Indeed, *American Stores* (which came to the Court from the Ninth Circuit) pointedly rejected the way in which the Ninth Circuit had relied on legislative history to limit the Clayton Act's textual grant of private injunctive relief. *Id* at 285. This in turn undercut *Wollersheim*, which had used the same methodology as the discredited *American Stores* opinion. For all these reasons, we find that § 1964 authorizes injunctive relief at the behest of both the Attorney General and private plaintiffs, authorizes interim measures when the Attorney General sues, and authorizes private treble damages only for private plaintiffs (and not the United States). The district court thus correctly

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[1]The remedial provisions of the Clayton Act are actually spread over far more than the two sections the defendants mention. In addition to §§ 4 and 16, the Clayton Act also includes (as codified) 15 U.S.C. § 15(b) (suits for actual damages brought by foreign governments), 15 U.S.C. § 15a (suits for treble damages brought by the United States for its own injuries to business or property), 15 U.S.C. § 15c (parens patriae suits brought by state attorneys general for treble damages on behalf of natural persons in the state), and 15 U.S.C. § 25 (actions for injunctive relief brought by the Attorney General).

concluded that RICO authorized the private plaintiffs here to seek injunctive relief.

III

With this much established, we may turn to the defendants' First Amendment arguments. All parties acknowledge that the defendants engaged in a substantial amount of protected speech during the protest missions and other anti-abortion activities, including picketing on public sidewalks in front of clinics and verbally urging patients not to have abortions. We entirely agree with the defendants that liability cannot constitutionally be imposed on them for this portion of their conduct. But the record is replete with evidence of instances in which their conduct crossed the line from protected speech into illegal acts, including acts of violence, and it is equally clear that the First Amendment does not protect such acts. As is true in many political protest cases, the defendants' protected speech was often closely intertwined with their unprotected illegal conduct. Nevertheless, we believe the district court adequately ensured that the jury's verdict was not based on activities protected by the First Amendment, and that the remedies it ordered also respected the line between protected expression and unprotected conduct.

The defendants' First Amendment arguments fall into two categories. First, they argue broadly that imposing liability on them on the basis of their protest activities violates the First Amendment. Second, they argue that, even assuming they could constitutionally be held liable for their alleged conduct, the jury instructions and verdict form in this case did not contain necessary First Amendment safeguards. Before we reach either of these arguments, we pause to consider the standard of review we should apply in analyzing the

defendants' First Amendment claims.

The Supreme Court has repeatedly held that, in cases in which First Amendment concerns are implicated, reviewing courts have an obligation to conduct an "'independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964). Although this maxim has been applied most often in cases reviewing the factual findings of lower courts, the Court in *Bose* noted that the rule is equally applicable "whether the factfinding function be performed in the particular case by a jury or by a trial judge." 466 U.S. at 501. Citing this rule, the defendants urge that our review of their First Amendment challenges must be plenary.

As we have noted before, however, even though *Bose* calls for an "independent examination of the whole record," it is not entirely clear what this "plenary" review is supposed to entail. *See Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1128-29 (7th Cir. 1987). In particular, it is not clear whether *Bose* requires an independent review only of the ultimate factual conclusion that the defendants' conduct fell outside the protection of the First Amendment, or whether this court is required to conduct a more searching review of "findings of underlying facts, evaluations of credibility, and the drawing of inferences." *Brown & Williamson*, 827 F.2d at 1128. In cases in which we are reviewing a jury verdict rather than the findings of a lower court, the question is even more complex, because we must somehow reconcile the defendants' First Amendment rights against the command of the Seventh Amendment that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to

the rules of the common law." U.S. Const. amend. VII. *Bose* itself involved review of facts found by the district court under Fed. R. Civ. P. 52(a), and thus the Court had no occasion to consider this problem. For a different reason, we conclude that it is not necessary here to decide whether or not a broader version of the re-examination of jury findings is permissible when First Amendment rights are at issue. Even assuming that the *Bose dicta* requires us to conduct a plenary review of all of the factual findings relevant to the First Amendment issues before us (which is the most favorable position we can take for the defendants), we find that the jury's determinations are fully supported by the record.

A.

Protection of politically controversial speech is at the core of the First Amendment, and no one disputes that the defendants' speech labeling abortion as murder, urging the clinics to get out of the abortion business, and urging clinic patients not to seek abortions is fully protected by the First Amendment. *See, e.g., Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263 (1993). It is equally clear, however, that the First Amendment does not protect violent conduct, *Wisconsin v. Mitchell,* 508 U.S. 476, 484 (1993), nor does it protect threats, *Madsen v. Women's Health Ctr.,* 512 U.S. 753, 773 (1994), or language used to carry out illegal conduct, *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502 (1949). Even when a defendant's conduct involves expressive elements, the government is free to regulate the non-expressive aspects of the conduct if such regulation is necessary to serve important government interests. *United States v. O'Brien,* 391 U.S. 367, 377 (1968). The protection of the plaintiffs' rights to seek and provide medical care free from violence, intimidation,

and harassment is such an important government interest. *See, e.g., Hill v. Colorado,* 530 U.S. 703, 715 (2000); *Schenck v. Pro-Choice Network of W. New York,* 519 U.S. 357, 376 (1997); *Madsen, supra,* 512 U.S. at 768. As the Supreme Court has explained, "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." *Roberts v. United States Jaycees,* 468 U.S. 609, 628 (1984).

In this case, the plaintiffs presented ample evidence that the individual defendants and others associated with PLAN engaged in illegal conduct that directly threatened an important governmental interest. The evidence presented at trial showed that, at PLAN-sponsored events, protesters trespassed on clinic property and blocked access to clinics with their bodies, including at times chaining themselves in the doorways of clinics or to operating tables. At other times, protesters destroyed clinic property, including putting glue in clinic door locks and destroying medical equipment used to perform abortions. On still other occasions, protesters physically assaulted clinic staff and patients. In addition, defendant Scheidler, on behalf of defendants PLAL and PLAN, sent letters to class clinics threatening that they would be subjected to similar attacks if they did not cease performing abortions. In light of the protesters' conduct at other PLAN events, the district court correctly concluded that these letters were not protected political speech but constituted true threats outside the protection of the First Amendment.

Assuming that the defendants can be held liable for these incidents, all of which occurred under PLAN sponsorship, then the plaintiffs produced ample evidence of illegal conduct that may legitimately be regulated given the importance of the governmental interest in protecting the right to seek and

provide medical care. In a case where a similarly important governmental interest is not present and the conduct in question has an expressive element, we do not disagree with the defendants that the First Amendment might well shield that particular conduct from being used as the basis for RICO liability. (We express this thought cautiously only because the balance between the strength of the government's interest and the degree to which conduct has an expressive element will vary from case to case.) In any event, this case presents no such problems. We are satisfied that the record here easily supports the jury's finding of liability.

At this point, the defendants shift their argument to a more personal one: maybe someone associated with PLAN was engaged in unprotected conduct, but the evidence did not establish that the defendants themselves were involved, as opposed to being involved exclusively in PLAN's protected speech activities. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Supreme Court noted that, where an organization engages in both protected speech and unprotected, illegal conduct, the First Amendment does not permit individuals to be held liable for the organization's illegal acts merely based on their association with the organization. *Id.* at 908-09. Rather, in order to impose liability on an individual based on that individual's association with an organization, a plaintiff must show both that the organization itself, rather than just isolated members, possessed unlawful goals and that the individual defendant held a specific intent to further those illegal aims. *Id.* at 920.

We agree that *Claiborne Hardware* is directly applicable to our case. Although the plaintiffs established that the individual defendants themselves participated in many of the incidents described during the trial, the plaintiffs also introduced evidence of many other incidents coordinated or orchestrated

by PLAN for which they did not specifically show that the individual defendants themselves committed the illegal acts described. In order for the defendants to be held responsible for acts committed by other members of PLAN during PLAN-organized events, *Claiborne Hardware* required the plaintiffs to show that PLAN itself, and not merely isolated members, intended that the illegal acts occur, that the defendants were aware of PLAN's illegal aims, and that the defendants held a specific intent to further those aims through their association with PLAN.

Even though this is an exacting test, once again the record shows that the plaintiffs satisfied it in this case. All of the individual defendants who remain in the case were on the board of directors of PLAL. PLAL and Operation Rescue, the two remaining organizational defendants, were in turn the primary organizers of PLAN. The plaintiffs put into evidence numerous letters, newsletters, and other publications authored by defendant Joseph Scheidler, executive director of PLAL, and by Randall Terry, executive director of Operation Rescue, detailing the activities planned for upcoming PLAN events. The activities detailed in these letters included blocking access to clinics and entering clinics to block passageways. As noted above, these types of protest activities are illegal conduct unprotected by the First Amendment. Similarly, the threatening letters to plaintiff clinics were sent on PLAL letterhead, signed by Scheidler, and specifically described the threat as coming from PLAN. The jury was entitled to conclude from this evidence that PLAN itself, not merely isolated members, held illegal aims.

It is also significant that all of the individual defendants were high-level leaders within PLAN, and as such they knew of PLAN's illegal aims and intended to further those aims. The record showed that defendant Scheidler personally organized

and coordinated many of PLAN's activities. Defendants Scholberg and Murphy also participated in planning meetings for PLAN events at which illegal blockades were to take place and spoke at PLAN conventions designed to train protesters in the use of these tactics. The plaintiffs presented more than enough evidence to convince us that the individual defendants actively intended to further PLAN's illegal goals.

B.

Turning to the defendants' narrower First Amendment argument, the defendants contend that, regardless of whether there was sufficient evidence from which the jury could have found that they engaged in unprotected activities, the jury instructions and verdict form used by the trial court allowed the jury to find the defendants liable based solely on the defendants' protected speech. The verdict form that the district court used asked the following relevant questions:

1. Is the Pro-Life Action Network (PLAN) a group of people or organizations associated together for a common purpose?

2. Were the . . . defendants associated with PLAN? (See Jury Instruction No. 20 for the definition of "associated with.") . . .

4. Did any Defendant, or any other person associated with PLAN, commit any of the [alleged predicate acts]?

The jury instruction to which the verdict form referred stated, in relevant part:

Jury Instruction No. 20: Plaintiffs must show that the

> defendant was "associated with" PLAN. That is, the defendant must have had some minimal association with PLAN and have known something about PLAN's activities as they relate to the illegal acts under RICO. It is not necessary that the particular defendant committed acts unlawful under RICO or was aware of all of the unlawful acts committed by the other people who were associated with PLAN. . . . .

In the district court, the defendants objected to these instructions, arguing that they did not require the jury to find that the defendants harbored a specific intent to further PLAN's illegal aims, as required by *Claiborne Hardware*. The district court apparently agreed, because it added an additional jury instruction which stated:

> Jury Instruction No. 30 -- Defendants' Liability for Acts of Others
>
> Liability may not be imposed upon any defendant merely because that defendant belonged to a group, some members of which committed acts of violence. In order to find the defendants liable, you must conclude that the enterprise, or those acting on behalf of the enterprise, directly or indirectly authorized or ratified unlawful activities and that the defendants held a specific intent to further those illegal objectives.

The defendants did not renew their objection to the jury instructions after the district court made this change. Nevertheless, in this court, the defendants have argued that, even with the additional instruction, the jury instructions did not adequately protect their First Amendment rights, because

the *Claiborne Hardware* standard was incorporated only into the jury instructions, not into the verdict form.

Initially, we note that by not renewing their objection to the jury instructions and verdict form after the district court added Instruction 30, the defendants at least implied that they were satisfied with the court's resolution of their objection. Accordingly, we are inclined to find that the defendants have waived any objection to those instructions on appeal. *See United States v. Jones,* 224 F.3d 621, 626 (7th Cir. 2000) (objection to jury instruction waived where defense counsel agreed to instruction at trial). Because this is a civil trial, not a criminal trial, there is no equivalent of "plain error" review for a challenge that is forfeited rather than waived. In the interest of absolute fairness, however, we will consider this point based on the earlier objections.

Our review of jury instructions is deferential, and we consider only whether the instructions, taken as a whole, adequately informed the jury of the applicable law. *Molnar v. Booth,* 229 F.3d 593, 602 (7th Cir. 2000). We are confident that these instructions did so. This jury could not have found the defendants liable without finding that the defendants themselves specifically intended to further PLAN's illegal aims. Jury Instruction 30 made this requirement explicit, and absent any indication to the contrary, we presume that jurors follow the instructions they are given. *Miksis v. Howard,* 106 F.3d 754, 763 (7th Cir. 1997). There is no requirement for a district judge to replicate every instruction on the verdict form itself. We are confident that the jurors followed their instructions, heeded Instruction 30 when they considered the questions on the special verdict form, and that nothing on the form misled or confused them or caused them to ignore their instructions.

IV

The last serious contention we must address is the defendants' argument that the injunction in this case is vague and overbroad. The operative portion of the injunction reads as follows:

> Defendants . . . and any other on their behalf or in concert with them, are hereby enjoined from directly or indirectly:
>
> a. Interfering with the right of any member of the Certified Class of Plaintiff Clinics to conduct its business (including but not limited to the right to provide abortion services) or the right of any NOW member or any member of the Certified Class of women to avail herself of the Plaintiff Clinics' services (including but not limited to abortion services), by:
>
> (1) blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of any Plaintiff Clinic;
>
> (2) trespassing on the premises or the private property of any Plaintiff Clinic;
>
> (3) destroying, damaging or stealing property of any Plaintiff Clinic, its employees, volunteers, or any woman who seeks to use the services of such a Clinic;
>
> (4) using violence or threat of violence against any Plaintiff Clinic or any of its employees, volunteers,

or any woman who seeks to use the services of such a Clinic;

b. aiding, abetting, inducing, directing, or inciting any of the acts enumerated in subsection a. of this paragraph (the "Acts") through any of the Defendants or through others; or

c. Operating an enterprise through any of the Acts described above.

This injunction does not prohibit or preclude activities that are constitutionally protected, including but not limited to the following conduct:

a. Peacefully carrying picket signs on the public property in front of any Plaintiff Clinic;

b. Making speeches on public property;

c. Speaking to individuals approaching the clinic;

d. Handing out literature on public property; and

e. Praying on public property.

This injunction shall bind Defendants . . . and all other persons in active concert with them, and who have actual or constructive notice of this Order, and any other person acting in concert with PLAN.

The defendants raise two principal objections to the scope of the injunction. First, they complain that it contains a number of

terms that are vague or indefinite, and that as such, it is likely to chill a substantial amount of protected speech. Second, the defendants charge that the injunction makes them liable for the conduct of persons they do not control and for actions they do not authorize or approve. We consider each of these contentions in turn.

First, we recognize that it is a delicate task to craft an injunction that prohibits illegal conduct when that conduct is closely tied to political protests and other protected activity. The court must tread carefully to avoid hampering protected speech. Here, we do not disagree with the proposition that some language in this injunction, taken in the abstract, is rather general. But the key question is: Compared to what? Any effort to deal with a case of this complexity will inevitably involve some imprecision. Many criminal statutes contain key terms such as the word "material" which are somewhat imprecise but have never been considered void for vagueness. The defendants in this case never proposed any alternative language for an injunction, despite several invitations from the district court to do just that, so the real question is whether the injunction the court entered is as precise as possible while still ensuring that the defendants' illegal activities are enjoined.

We are satisfied that the injunction drafted by the district court here has struck the proper balance and has avoided any risk of curtailing protected activities. By its terms, the injunction prohibits only illegal conduct -- trespassing, obstructing access to clinics, damaging property, using violence or threats of violence, or aiding, abetting, inducing, directing, or inciting any of these acts. We do not find any ambiguity in the terms the district court used to describe the prohibited conduct, and as discussed above, none of this conduct is protected by the First Amendment.

Although we do not believe that the terms of the injunction

would reach protected speech in any case, the injunction itself includes an additional safeguard. A specific provision underscores that it does not prohibit peaceful picketing, speeches, or praying on public property, attempts to speak with patients and staff, handing out literature, or any other activity protected by the First Amendment. Given this explicit language, there can be no doubt that this injunction reaches only unprotected, illegal conduct, not protected speech. The defendants' alarmist prediction that, under the terms of the injunction, a protester who engages in "months of peaceful picketing" and then takes "two accidental footsteps onto private property" could be subject to contempt proceedings not only for trespass but also for the picketing is pure fancy and bears no relation to the actual wording of the injunction.

Nor do we find that the injunction impermissibly holds the defendants responsible for the actions of persons beyond their control. The injunction applies only to the defendants and to persons working in "active concert" with the defendants or in concert with PLAN. For that reason alone, the injunction's sweep is not so broad as the defendants suggest. Activists and protesters not closely associated with the defendants or with PLAN, an organization the defendants control, are not affected by the injunction. (This takes care of the specter of renegades who, the defendants assert, are utterly beyond their control.) Moreover, to the extent the injunction reaches the conduct of individuals not named in this lawsuit, the order enjoins those individuals from violating its mandates. If individuals acting in concert with the defendants or PLAN violate the injunction, without inducement or direction by the defendants, the violators, not the defendants, would be in contempt of the court's order. Nothing in the order purports to hold the defendants liable for actions they do not direct, incite, or control.

The injunction as it is written is narrowly tailored to prohibit the specific types of illegal conduct that the defendants have engaged in on past protest missions. As such, it does not threaten the defendants' First Amendment rights. We are confident that the district court will take as much care in enforcing the injunction as it plainly took in crafting it. Indeed, with its explicit protection of peaceful picketing, speech, literature, and prayer, perhaps in the end the injunction may further rational discourse on one of the most volatile political controversies facing the nation today. Violence in any form is the antithesis of reasoned discussion. By directing those with passionate views about the abortion controversy -- on either side -- away from the use of threats and violence and back to "all the peaceful means for gaining access to the mind," the injunction the district court issued is in harmony with the fundamental First Amendment protection of free speech.

V

The defendants have raised a hodgepodge of other challenges to the judgment, none of which need detain us long. First, the defendants point out that in the plaintiffs' First and Second Amended Complaints (which were filed before the first set of appeals in the case) only the clinic plaintiffs alleged RICO claims; NOW joined only the counts alleging antitrust violations. As noted above, when the Supreme Court granted certiorari to review our earlier decision in this case, that grant was limited to questions concerning the RICO counts. The antitrust claims fell out of the case after the Court declined to review our decision with respect to them. According to the defendants, once all the counts to which NOW was a party fell out of the case, the effect was the same as a final judgment against NOW, and res judicata barred the plaintiffs from

amending their complaint to include NOW as a plaintiff in the RICO counts. The district court, however, permitted the plaintiffs to file a Third Amended Complaint, after remand from this court, which included NOW as a plaintiff in the RICO counts.

Whether to allow amendments to a complaint is a question committed to the discretion of the trial court. *Bethany Pharmacal Co. v. QVC, Inc.*, 241 F.3d 854, 861 (7th Cir. 2001). Contrary to the defendants' assertion, there was no final judgment in this case after the Supreme Court's decision to which res judicata principles could apply. The case was still pending, first in this court and then in the district court. As a general rule, amendments to complaints are liberally allowed up to and even after trial, judgment, and appeal. *See United States v. Security Pac. Bus. Credit, Inc.*, 956 F.2d 703, 707-08 (7th Cir. 1992); *see also Guse v. J.C. Penney Co.*, 570 F.2d 679, 680 (7th Cir. 1978) (even after plaintiff lost on appeal, there was no final judgment against plaintiff, and district court was free to allow plaintiff to file amended complaint putting forth new legal theory). The Supreme Court made it clear in its opinion that it was evaluating the complaint only on the pleadings, *see* 510 U.S. at 256, 262, which is the most preliminary stage of proceedings one can imagine. The district court was thus well within its discretion in allowing NOW to continue as a plaintiff for the RICO claims in the Third Amended Complaint.

The defendants also argue that the clinics' claims are barred by *res judicata*. While this case was pending, one of the plaintiff clinics, Summit Women's Health Organization, filed suit in state court in Wisconsin seeking an injunction against Scheidler and several other defendants to prevent PLAN from engaging in illegal blockades during a PLAN convention in Milwaukee. The Wisconsin courts ultimately dismissed that

lawsuit without prejudice as to most of the defendants. However, before the case was dismissed, Scheidler and the Summit Women's Health Organization entered into a settlement agreement that specified that "all claims against [Scheidler] relating to conduct which occurred prior to the signing of this stipulation are hereby dismissed as to [Summit] with prejudice." The defendants argue that, because the claims that Summit raises in this case had already accrued at the time Summit entered into this stipulation, Summit is barred from bringing these claims in this lawsuit.

We need not consider what preclusive effect the Wisconsin settlement might have, because the defendants waived this issue in the district court. *Res judicata* is an affirmative defense that is waived if a party does not plead it. Fed. R. Civ. P. 8(c). Under the local rules of the Northern District of Illinois, the defendants were required to list all their defenses in their trial brief, and any defenses not listed were waived. The defendants admit that they did not list res judicata based on the Wisconsin litigation as an affirmative defense in their trial brief, and accordingly they have lost the opportunity to argue that issue here. Although we find that this claim is waived, we also note that, even if it were not waived and if the Wisconsin settlement had a preclusive effect in this case, the preclusion could run only between Summit and Scheidler and would not affect any of the other plaintiffs, including the class members, or any of the other defendants. The injunction would not be affected, all of the defendants would remain jointly liable for the damages to Delaware Women's Health Organization, and all of the defendants except Scheidler would remain liable to Summit. The practical effect of any preclusion would therefore be negligible.

The defendants have also urged this court to decertify the two classes, arguing that NOW and the named clinics are

inadequate class representatives. The defendants particularly object to the district court's decision to include in the NOW class women who are not members of NOW, arguing that because NOW is a partisan advocacy group and the issues involved in this case concern a matter of great social controversy, NOW is likely to have interests antagonistic to the views of some members of the class. Class certification decisions are committed to the discretion of the district court, however, *see Chavez v. Illinois State Police,* 251 F.3d 612, 629 (7th Cir. 2001), and we find that the district court's decision to certify the two classes here was well within the court's discretion. It is inaccurate in any event to imply that the district court certified a class of "all women." The court did no such thing. Instead, it certified a class that included only those women, whether or not members of NOW, whose right to seek abortion services has been or will be interfered with by the defendants. In order for these women's interests to be antagonistic to the claims NOW is bringing, the defendants would have to argue that at least some women in the class want to seek abortion services, but do not want to be free from harassment and intimidation while doing so. This scenario strikes us as exceedingly unlikely; at the very least, we agree with the district court that it "is clearly speculative and projects personally held views onto the plaintiff class." *National Organization for Women, Inc. v. Scheidler,* 172 F.R.D. 351, 362 (N.D. Ill. 1997).

As to the defendants' more general arguments that the named plaintiffs have not performed adequately as class representatives, we note that the named plaintiffs have pursued this litigation diligently for fifteen years, through a trip to the Supreme Court of the United States and a seven-week trial, and ultimately were successful in securing a nationwide injunction against the defendants prohibiting the conduct they set out to

challenge. Given this record of performance, we cannot say that the district court in any way abused its discretion in certifying these classes.

The defendants have also argued that the conduct in which they engaged is not prohibited by RICO for a number of reasons. First, the plaintiffs alleged as predicate acts numerous violations of the federal extortion statute, the Hobbs Act, 18 U.S.C. § 1951, and the defendants argue that the Hobbs Act does not apply to their conduct. The defendants' primary contention on this point is that the Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear," and that the things the plaintiffs claim were taken here -- the class women's rights to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their businesses -- cannot be considered "property" for purposes of the Hobbs Act. However, this circuit has repeatedly held that intangible property such as the right to conduct a business can be considered "property" under the Hobbs Act, *see, e.g., United States v. Anderson,* 716 F.2d 446, 450 (7th Cir. 1983), and we will not revisit that holding here.

In a similar vein, the defendants assert that, even if "property" was involved, the defendants did not "obtain" that property; they merely forced the plaintiffs to part with it. Again, this argument is contrary to a long line of precedent in this circuit holding that "as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required." *United States v. Stillo,* 57 F.3d 553, 559 (7th Cir. 1995).

In addition to their challenges to the application of the Hobbs Act, the defendants argue that the district court erred in

giving the jury a generic instruction describing the elements of the state law extortion offenses the plaintiffs alleged as additional predicate acts. According to the defendants, there are substantial differences in the extortion laws of the states in which these alleged predicate acts occurred, and the district court's attempt to cover all the relevant state laws with a single, generic instruction impermissibly discounted these differences. Without expressing an opinion on whether this approach was permissible, we simply note that, if any error occurred, it was harmless. The jury found that the defendants committed 21 predicate acts under the Hobbs Act alone, which is far in excess of the two predicate acts that RICO requires. In the face of this finding, any error in the state extortion law instructions, which could at most have affected the jury's decision on the additional state-law predicate acts it found, could not have had any effect on the outcome of this case.

Finally, while this appeal was pending, the defendants filed motions in the district court seeking relief from the judgment under Rules 60(b)(2) and (3). The district court denied the motions, and the defendants appealed. We consolidated that appeal with this case and suspended briefing on the 60(b) issues. We have reviewed the defendants' motions in the trial court and the trial court's resolution of those issues, and we conclude that no further briefing on the issues is necessary.

"Rule 60(b) relief is an extraordinary remedy granted only in exceptional circumstances." *Rutledge v. United States*, 230 F.3d 1041, 1052 (7th Cir. 2000). Our review of the district court's decision denying relief is deferential, and we will reverse only if the district court has abused its discretion. *J&W Fence Supply Co. v. United States,* 230 F.3d 896, 898 (7th Cir. 2000). We find no abuse of discretion in this case. In their 60(b) motions, the defendants argued that they had newly discovered evidence relating to two specific incidents

described by witnesses during the trial. In addition, the defendants posited that newly discovered evidence called into doubt whether an anonymous witness who testified at the trial in fact needed to remain anonymous. The district court denied the motions on the grounds that the defendants had documents in their possession from which they could have discovered most of the "new" evidence for well over a decade, and that relief at this late date accordingly was not warranted. In addition, the court noted that it was very unlikely that any of the "new" evidence, if admitted at trial, would have had any impact on the jury's verdict. Given that Rule 60 motions cannot be used to present evidence that with due diligence could have been introduced before judgment, *Rutledge,* 230 F.3d at 1052, or to put forth evidence that is not material or that would likely not change the result at trial, *Jones v. Lincoln Elec. Co.,* 188 F.3d 709, 732 (7th Cir. 1999), we find no error in the district court's denial of relief.

We have considered all of the defendants' remaining contentions, but find none that requires comment. For the foregoing reasons, the judgment of the district court is Affirmed in all respects.

APPENDIX G

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC. v. NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

01-1118, 01-1119

SUPREME COURT OF THE UNITED STATES

April 22, 2002

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: The motion of People for the Ethical Treatment of Animals, Inc., for leave to file a brief as amicus curiae is granted. The motion of Seamless Garment Network, et al., for leave to file a brief as amici curiae is granted. The motion of Life Legal Defense Foundation for leave to file a brief as amicus curiae is granted. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit granted limited to Questions 1 and 2 presented by the petition in No. 01-1118. The cases are consolidated and a total of one hour is allotted for oral argument.

APPENDIX H

The Hobbs Act, 18 U.S.C. § 1951, provides in relevant part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

APPENDIX I

RICO [excerpts], 18 U.S.C. §§ 1961, 1964

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964, provides in relevant part:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he

sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

18 U.S.C. § 1964 [prior to 1995 amendment]

APPENDIX J

86 C 7888 N.O.W. et al. v. Scheidler, et al.

SPECIAL INTERROGATORIES AND VERDICT FORM

We, the jury in this action, unanimously find as follows:

1. Is the Pro-Life Action Network (PLAN) a group of people or organizations associated together for a common purpose?

   Yes ✓ No ___

2. Were the following Defendants associated with PLAN? (See Jury Instruction No. 20 for the definition of "associated with")

Joseph Scheidler	Yes ✓	No ___
Andrew Scholberg	Yes ✓	No ___
Timothy Murphy	Yes ✓	No ___
Pro-Life Action League	Yes ✓	No ___
Operation Rescue	Yes ✓	No ___

3. Did the following Defendants participate in the operation or management of PLAN? (see Jury Instruction No. 21 for a definition of participation in operation or management)

Joseph Scheidler	Yes ✓	No ___
Andrew Scholberg	Yes ✓	No ___

Timothy Murphy Yes ✓ No ___

Pro-Life Action League Yes ✓ No ___

Operation Rescue Yes ✓ No ___

4. Did any Defendant, or any other person associated with PLAN, commit any of the following acts?:

		Yes	Number of Acts	No
(a)	Acts or threats involving extortion against any patient, prospective patient, doctor, nurse, or clinic employee, in violation of federal law	✓	21	
(b)	Acts or threats involving extortion against any patient, prospective patient, doctor, nurse, or clinic employee, in violation of the law of any state	✓	25	
(c)	Threats of murder against a doctor, nurse, or clinic employee		0	✓
(d)	Attempt or conspiracy to do any of the acts listed above, even if the act was not actually carried out	✓	25	
(e)	Acts or threats of physical violence to any person or property	✓	4	

(f)	Travel across state lines, or the use of the mail or telephone, with intent to commit or facilitate an unlawful act, such as extortion, under state or federal law	✓	23	
(g)	Attempt to do an act described in (f) above, even if the act was not actually carried out	✓	23	
(h)	Causing another person to do an act described in (f) above		0	✓

5. Were at least two (2) of these acts committed during any ten-year period?

   Yes ✓ No ___

6. If you answered "yes" to any item of 4(a) or 4(b), was your answer based solely on blockades of clinic doors or sit-ins within clinics, without more?

   Yes ___ No ✓

7. Did PLAN or persons associated with PLAN engage in a "pattern" of at least two of the acts that you found in Question 4 above? (see Jury Instruction No. 28 for the definition of "associated with")

   Yes ✓ No ___

8. Did any of the acts that you found in Question 4 above affect interstate commerce? (see Jury Instruction No. 19 for the definition of interstate commerce)

Yes ✓ No ___

9. If any defendant or any person associated with PLAN committed any two (2) acts described or listed above in question number 4 within any 10 year period, did those acts proximately cause injury to the business or property of the following plaintiffs? (see Jury Instruction No. 28 for the definition of proximate cause)

The women represented by NOW:

Yes ✓ No ___

Delaware Women's Health Organization:

Yes ✓ No ___

Summit Women's Health Organization:

Yes ✓ No ___

If you answered "yes" to Questions 1, 5, 7 and 8, and if you found that at least two acts were committed in Question 4, and if you answered "yes" as to any Defendant(s) in Questions 2 and 3, you have found those Defendant(s) liable on Claim I, and you should proceed to the next question:

10. As to the Defendants whom you have found liable on Claim I, what amount will adequately compensate these Plaintiffs for their RICO injuries?

Summit Women's Health Organization *$54,471.28*

Delaware Women's Health Organization $31,455.64

If you found all of the Defendants liable on Claim I, you need not proceed any further; simply go to the last page and sign and date the Verdict Form.

If you did not find all of the Defendants liable on Claim I, you should answer the following questions as to Claim II for any such Defendant(s):

11. Did the following Defendants combine or agree with one another or with others to operate PLAN through a pattern of acts illegal under RICO?

Joseph Scheidler	Yes ___	No ___
Andrew Scholberg	Yes ___	No ___
Timothy Murphy	Yes ___	No ___
Pro-Life Action League	Yes ___	No ___
Operation Rescue	Yes ___	No ___

12. As to the Defendant or Defendants whom you have found liable on Claim II, what amount will adequately compensate these Plaintiffs for their RICO injuries?

Summit Women's Health Organization $_____

Delaware Women's Health Organization $_____

Please now sign and date the verdict form and tell the bailiff that you have reached a verdict.

4-20-98 *[s/ Amandis Rott]*

Date

Foreperson

/s/ Sheila L. Lark
Juror

/s/ Patricia L. Mitchell
Juror

/s/ Kats Nakashima
Juror

/s/ Patrick L. Ostrander
Juror

/s/ Julie Martin
Juror

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Juror

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Juror

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